Implementatie van het EVRM en de uitspraken van het EHRM in de nationale rechtspraak

Een rechtsvergelijkend onderzoek

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INHOUDSOPGAVE

SAMENVATTING

Aanleiding, onderzoeksvragen en aanpak

De invloed van het Europees Verdrag voor de Rechten van de Mens (EVRM) op het Nederlandse recht en op de Nederlandse rechtspraak is groot. Vaak worden twee veronderstellingen aangevoerd als verklaring hiervoor. Enerzijds wordt aangenomen dat de traditionele openheid van Nederland voor het internationale recht verantwoordelijk is voor de sterke doorwerking, in combinatie met het verbod om formele wetten te toetsen aan de Grondwet. Anderzijds wordt een verklaring gezocht in de activistische houding van het Europees Hof voor de Rechten van de Mens (EHRM) en de toegenomen impact van zijn rechtspraak. Juist door de bijzondere constitutionele kenmerken van het Nederlandse systeem, zo is vervolgens de aanname, werkt de vergaande EHRM-rechtspraak direct en indringend in de Nederlandse rechtsorde door.

De doorwerking van internationaal recht via de nationale rechtspraak, in het bijzonder van het EVRM en de EHRM-rechtspraak, is sinds enkele jaren voorwerp van discussie. Om een goede feitelijke basis te kunnen verschaffen voor deze discussie heeft het Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), op verzoek van de Directie Wetgeving en Juridische Zaken van het Ministerie van Veiligheid en Justitie, het voorliggende onderzoek laten uitvoeren. In dit onderzoek staat de wisselwerking centraal tussen, enerzijds, constitutionele systemen van doorwerking van internationaal recht en, anderzijds, de manier waarop en de mate waarin de nationale rechter toetst aan, of anderszins rekening houdt met, het EVRM en de jurisprudentie van het EHRM. De voorliggende studie heeft zich geconcentreerd op een vijftal onderzoeksvragen:

1. Welke eisen stelt het EHRM aan de nationale doorwerking van het EVRM en de toepassing van de EHRM-rechtspraak en hoeveel ruimte laat het EHRM voor nationale eigenheid?
2. Op welke wijze voorziet het constitutioneel recht in de doorwerking van het internationaal recht in het algemeen, en van het EVRM in het bijzonder, in de nationale rechtsorde?
3. Welke constitutionele bevoegdheden en technieken gebruiken nationale rechters om te bevorderen dat de staat voldoet aan zijn verplichtingen onder het EVRM?
4. Hoe gaan nationale rechters om met de rechtspraak van het EHRM en wat is de invloed van de EHRM-jurisprudentie op de nationale rechtspraak?
5. In welke mate is er op nationaal niveau discussie over het EHRM en zijn jurisprudentie en, als die er is, in hoeverre heeft deze invloed op debatten over bevoegdheden van de nationale rechter?

Om deze vragen te kunnen beantwoorden, is voor de onderhavige studie gekozen voor een tweeledige onderzoeksopzet. In de eerste plaats is onderzocht welke eisen het EHRM aan nationale rechtspraak stelt en hoe het EHRM omgaat met nationale kritiek op zijn uitspraken. Daartoe is uitvoerig rechtspraak- en literatuuronderzoek verricht; daarnaast zijn diepte-interviews gehouden met zes rechters en drie griffiers van het EHRM. In de tweede plaats is rechtsvergelijkend onderzoek verricht naar de manier waarop het internationale recht, in het bijzonder het EVRM en de EHRM-rechtspraak, doorwerkt in de nationale rechtspraak. Op basis van een uitvoerige questionnaire hebben landenexperts voor zes staten (België, Duitsland, Frankrijk, Nederland, het Verenigd Koninkrijk en Zweden) onderzocht welke juridische status het internationaal recht in de nationale rechtsorde heeft, in hoeverre nationale rechters bevoegd zijn wetgeving en bestuursbesluiten te toetsen aan verdragen en ander internationaal recht en welke bevoegdheden zij hebben en benutten om het EVRM en de jurisprudentie van het EHRM toe te passen. Ook zijn zij nagegaan in hoeverre EHRM-rechtspraak voor de nationale rechters toegankelijk is en in welke mate er discussie bestaat over de invloed van de EHRM-rechtspraak op het nationale recht.

Antwoorden op de onderzoeksvragen

1. Het EHRM heeft in toenemende mate verplichtingen opgelegd aan de nationale rechters tot EVRM-conforme toepassing van nationaal recht. Bovendien is de reikwijdte van de EVRM-rechten in de loop van de jaren sterk uitgebreid. De uitbreiding en verdieping van de verplichtingen voor nationale rechters zijn gepaard gegaan met een versterking van de idee van samenwerking en dialoog tussen nationale rechters en het EHRM. Het EHRM nodigt nationale rechters uit om een eigen uitleg aan het EVRM te geven, zelfs als die afwijkt van die in de EHRM-rechtspraak, nu op die manier tot rechtsontwikkeling en verfijning kan worden gekomen. Daarnaast heeft het EHRM tal van mechanismen ontwikkeld waardoor het de eigenheid van het nationale recht kan respecteren. Het Hof verlangt weliswaar dat zijn doctrines en criteria worden ingepast in het nationale recht, maar laat het daarvoor tegelijkertijd veel ruimte. Het accepteert dat soms wordt gekozen voor een uitkomst die afwijkt van wat het zelf zou hebben geoordeeld, zolang een minimum van grondrechtenbescherming maar wordt gegarandeerd.

2. Hoewel het gebruikelijk is de constitutionele systemen die staten hanteren om het internationaal recht te laten doorwerken in de nationale rechtsorde, te onderscheiden in 'monistische' en 'dualistische' stelsels, zeggen deze etiketten weinig over de wijzen waarop individuele staten in deze doorwerking voorzien. Zo maakt het internationaal gewoonterecht niet alleen in monistische landen als België, Frankrijk en Nederland deel uit van het binnen de staat geldende recht, maar ook in bijvoorbeeld Duitsland en het Verenigd Koninkrijk, die als dualistisch te boek staan. In België, Frankrijk en Nederland is de nationale rechter daarnaast bevoegd om verdragen, waaronder het EVRM, toe te passen, maar hetzelfde geldt voor Duitsland. Daarentegen bewerkstelligt in Duitsland de goedkeuring van een verdrag door het nationale parlement dat dit dezelfde rang heeft als een federale wet, terwijl in België, Frankrijk en Nederland verdragen, althans voor zover zij zich lenen voor rechterlijke toepassing, voorrang hebben op anterieure en posterieure wetten. In Nederland en België moet zelfs de Grondwet wijken voor verdragsbepalingen die de rechter mag en kan toepassen (waartoe de bepalingen van het EVRM behoren). In het dualistische Zweden maken verdragen weliswaar geen deel uit van het binnen de staat geldende recht, maar is het EVRM tot nationale wet gemaakt. Bovendien is de Zweedse rechter krachtens de constitutie bevoegd om anterieure en posterieure wetten aan het EVRM te toetsen, zodat dit verdrag quasi-constitutionele status heeft. In het Verenigd Koninkrijk is de nationale rechter eveneens bevoegd gemaakt om bepalingen van het EVRM toe te passen, zij het dat hij een conflict met primaire wetgeving wel kan constateren, maar – anders dan via EVRM-conforme uitleg van deze wetgeving – niet mag oplossen.

3. De bevoegdheden die nationale rechters hebben om overeenstemming met het internationale recht (in het bijzonder het EVRM) te garanderen verschillen sterk. Deze verschillen hangen deels samen met de uiteenlopende status van het EVRM in de nationale normenhiërarchie. Formeel zijn de bevoegdheden van de rechter om schendingen te voorkomen van de materiële bepalingen van EVRM, zoals deze zijn uitgelegd in de jurisprudentie van het EHRM, het grootst in staten waar de rechter wetten en eventueel zelfs de Grondwet buiten toepassing mag laten wegens strijd met deze bepalingen. De praktijk wijst echter uit dat de gevallen waarin de rechter daadwerkelijk een primaire wet (in Nederland een wet in formele zin) buiten toepassing laat vanwege het EVRM, betrekkelijk zeldzaam zijn. Omgekeerd leert de ervaring in het Verenigd Koninkrijk – het enige van de zes onderzochte landen waar de rechter geen enkele bevoegdheid heeft om primaire wetgeving te laten wijken voor het EVRM – dat de politieke organen in verreweg de meeste gevallen gevolg geven aan een door de rechter geconstateerde onverenigbaarheid. Voor alle in dit onderzoek betrokken staten geldt dat de nationale rechter bij voorkeur een conflict tussen een primaire wet en het EVRM voorkomt door nationaal recht zo mogelijk in overeenstemming met het EVRM en de jurisprudentie van het EHRM uit te leggen. In het Verenigd Koninkrijk is de nationale rechter zelfs wettelijk verplicht om, voor zover mogelijk, het nationaal recht uit te leggen en toe te passen om een manier die voorkomt dat bepalin-

gen van het EVRM geschonden worden. In België, Duitsland en Frankrijk, waar een rechterlijk oordeel over de grondwettigheid van primaire wetten is voorbehouden aan een constitutioneel hof, blijken de constitutionele hoven de in de nationale constitutie vervatte grondrechten te interpreteren in het licht van het EVRM en de rechtspraak van het EHRM, waardoor primaire wetten indirect getoetst worden aan de bepalingen van dit verdrag, zoals deze worden uitgelegd door het EHRM.

4. Waar het gaat om de toepassing van de EHRM-rechtspraak door nationale rechters, blijkt de aard van het constitutionele systeem voor doorwerking van internationaal recht nauwelijks relevantie te hebben, net zomin als de beschikbare constitutionele bevoegdheden. Of het systeem nu overwegend monistisch of overwegend dualistisch is: de nationale rechters proberen de uitleg van het EHRM zo zorgvuldig mogelijk te volgen. De betekenis en doorwerking van concrete EHRM-uitspraken in de nationale rechtspraak zijn hierdoor in alle onderzochte stelsels groot. Het is daarbij bepaald niet zo dat in monistische staten, zoals Nederland, Frankrijk en België, sprake is van meer 'slaafse' navolging van Straatsburg dan in dualistische staten, zoals het Verenigd Koninkrijk. De uitspraken van het EHRM hebben de nationale doctrines op het terrein van grondrechtenbescherming ook in dualistische staten sterk beïnvloed.

Tegelijkertijd blijken de rechters in alle onderzochte stelsels instrumenten te hebben ontwikkeld om de doorwerking van het EVRM te verzachten en om EHRM-precedenten naar de hand van het nationale recht te zetten. Zo zal de Nederlandse rechter, net als andere in deze studie onderzochte rechters, EHRM-doctrines, criteria en factoren zodanig bijbuigen en kneden dat deze goed aansluiten bij het nationale recht. Blijkt een EVRM-uitleg echt niet inpasbaar in het eigen recht, dan zal de rechter er soms zelfs van afzien om deze uitleg toe te passen. Daarnaast tonen de rechters in alle onderzochte staten zich terdege bewust van hun constitutionele positie. Zij toetsen wetgeving veelal terughoudend en zullen niet snel een verdergaande bescherming van grondrechten geven dan strikt vereist is volgens de EHRM-rechtspraak.

5. Brede en uitgesproken discussies over de vergaande impact van de EHRM-rechtspraak zijn vooral zichtbaar in het Verenigd Koninkrijk en, zij het anders getoonzet, in Nederland. In de andere onderzochte staten is de kritiek op de werkwijze van het EHRM beperkter en komt deze niet of nauwelijks in de politieke arena of in de media tot uitdrukking. Kritiek betreft hier veelal individuele, controversiële uitspraken.

Het EHRM lijkt vooral goed om te kunnen gaan met deze laatste vorm van kritiek. Als nationale rechters welbewust, expliciet en gemotiveerd bezwaren uiten tegen bepaalde EHRM-interpretaties, ziet het Hof hierin zelfs meerwaarde. De nationale uitspraken vormen dan de basis voor een dialoog tussen rechters, waarbij controverses en kritiekpunten op een juridische en voor het Hof goed hanteerbare manier worden geformuleerd. Landen waar de hoogste rechters actief en expliciet inzetten op een dialoog met het EHRM, zoals het Verenigd Koninkrijk en Duitsland, en waar de rechtspraak voor het EHRM goed toegankelijk is, blijken een aanzienlijke invloed te kunnen hebben op de rechtsontwikkeling bij het EHRM. In Nederland ontbreekt vaak een expliciete motivering van kritiek in rechterlijke uitspraken. Ook wordt vrijwel nooit voorzien in vertalingen van nationale uitspraken.

Slotsom

De aard van het constitutionele systeem voor doorwerking van internationaal recht via nationale rechtspraak is veel minder belangrijk voor de impact van het internationale recht dan vaak wordt aangenomen. In alle onderzochte staten is de betekenis van het EVRM en de EHRM-rechtspraak voor de nationale rechtspraak groot, of het systeem nu overwegend monistisch is, zoals in Nederland, Frankrijk, België en tot op zekere hoogte ook Duitsland, of overwegend dualistisch, zoals in het Verenigd Koninkrijk en Zweden. Ook zijn er in alle onderzochte landen constitutionele mechanismen aanwezig die het rechters mogelijk maken om de doorwerking van het EVRM naar hun hand te zetten en hun eigen taakstelling af te bakenen van die van andere staatsmachten. Het EHRM laat daarvoor

ruimte en stimuleert zelfs dat nationale rechters actief zoeken naar de beste vorm van grondrechtenbescherming binnen hun eigen systeem. Van die ruimte kan effectief gebruik worden gemaakt door in te zetten op goed gemotiveerde en toegankelijke rechterlijke uitspraken.

EXECUTIVE SUMMARY

Background, research questions and approach

The European Convention of Human Rights (ECHR) has had a great impact on Dutch law and Dutch case-law. Two assumptions are often made to explain this impact. First, it is often assumed that the traditional openness of Dutch law to international law is responsible for the powerful impact on national law, combined with a prohibition of constitutional review of acts of parliament. Secondly, an explanation is often found in the activist attitude of the European Court of Human Rights (ECtHR) and the growing impact of its case-law. It is then presumed that, as a consequence of the constitutional peculiarities of the Dutch legal system, the far-reaching ECtHR judgments penetrate directly and deeply into the Dutch legal order.

For some years now there has been a debate on the impact of international law (in particular the ECHR and the judgments of the ECtHR) given via national case-law. In order to provide a sound factual basis for this debate, the present study was commissioned by the Scientific Research and Documentation Centre of the Dutch government, at the request of the Ministry of Security and Justice. The study focuses on the interrelationship between, on the one hand, constitutional systems for the implementation of international law in the domestic legal order and, on the other hand, the way in which and the extent to which national courts apply (or otherwise take account of) the ECHR and the case-law of the ECtHR. The study concentrates on five research questions:

1. What requirements have been formulated by the ECtHR in relation to the implementation of the ECHR in national law and the application of ECtHR case-law by national courts, and to what extent does the ECtHR allow for national peculiarities?
2. How does national constitutional law provide for the implementation of international law, particularly the ECHR, in the national legal order?
3. Which constitutional powers and instruments do national courts use to guarantee that the state complies with its obligations under the ECHR?
4. How do national courts deal with the case-law of the ECtHR and what is the influence of ECtHR judgments on national case-law?
5. To what extent are the ECtHR and its case-law the subject of national debate and, to the extent that such debate exists, how does it influence debates on national courts' powers?

In order to answer these questions, the study has followed a dual approach. First, an analysis has been made of the requirements the ECtHR has formulated in respect to national case-law and of the way the ECtHR responds to criticism of its judgments. To this end, an extensive review of case-law and scholarly literature has been undertaken . In addition, in-depth, qualitative interviews have been conducted with six judges and three registrars of the ECtHR. Secondly, a comparative legal study has been conducted into the way international law, in particular the ECHR and the case-law of the ECtHR, impacts national case-law. Based on an extensive questionnaire, national experts in six states (Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom) have examined the status of international law in the national legal order; to what extent national courts are competent to review national legislation and administrative acts for their compatibility with international treaties and other international norms; and which competences they have and employ to apply the ECHR and the case-law of the ECtHR. The national experts have also investigated the extent to which the ECtHR's judgments are accessible to national judges and the extent to which the influence of ECtHR's case-law on national law is a matter for debate.

Answers to the research questions

1. The ECtHR has increasingly formulated obligations on the national courts to interpret and apply national law in conformity with the ECHR. Moreover, the scope of the rights protected by the ECHR has greatly expanded in recent years. The expansion and intensification of the obligations on national courts have been accompanied by a strengthening of the co-operation and dialogue between national courts and the ECtHR. The ECtHR invites national courts to give their own interpretation to the ECHR, even if it deviates from the interpretation given by the ECtHR, since this may lead to the further development and refinement of ECHR law. The ECtHR has also developed a number of instruments to help it respect national identity and national diversity. Although the ECtHR requires that its doctrines and criteria be applied in national law, it leaves the states a great deal of leeway to decide how to do so. As long as a minimum of fundamental rights protection is guaranteed, the ECtHR is even willing to accept different outcomes from what it would itself have achieved.

2. Although it is common to classify the constitutional systems that states use to give effect to international law as 'monist' and 'dualist' systems, these labels are not really indicative of the way such effect is put into practice. For example, international customary law is not only part of the law of the land of monist countries such as Belgium, France and the Netherlands, but also of Germany and the United Kingdom, which are usually characterised as dualist states. In Belgium, France and the Netherlands, the national courts are also competent to give direct effect to treaty provisions, yet the same is true of Germany. In Germany, however, the consent of the national parliament to an international treaty ensures that such a treaty has the same status as a federal act of parliament, while in Belgium, France and the Netherlands, international treaties (insofar as they have direct effect) have priority over both anterior and posterior national acts of parliament. In the Netherlands and Belgium, even the Constitution must be disapplied if that is necessary to avoid violations of the international treaty provisions which have direct effect (including the provisions of the ECHR). In dualist Sweden, international treaties may not be part of the law of the land, but the ECHR has been transformed into national legislation. Moreover, the Swedish constitution has empowered the Swedish courts to review anterior and posterior acts of parliament for their conformity with the ECHR, which implies that this treaty has quasi-constitutional status. In the United Kingdom, the national courts are also competent to apply provisions of the ECHR, although they are not permitted to resolve conflicts between primary legislation and the Convention which cannot be avoided by means of treaty-consistent interpretation. In such cases they must confine themselves to a 'declaration of incompatibility'.

3. National courts diverge greatly in their competence to guarantee compliance with international treaty obligations (in particular with the obligations resulting from the ECHR). The differences are partly related to the differences in status of the ECHR in the national hierarchy of law. Formally and legally, the competence to avoid violations of the substantive provisions of the ECHR is most far-reaching in those states where the courts may disapply acts of parliament and sometimes even the Constitution if they constitute a violation of the ECHR. In practice, however, it is very rare for courts to actually disapply primary legislation because of the ECHR. The other way around, the experience in the United Kingdom – the only state of the six states studies in which the courts do not have any powers to give priority to the ECHR over primary legislation – is that the political institutions almost always give consequence to a court finding of an incompatibility with the ECHR. In all states studied, however, it is clear that the courts prefer to avoid violations of the ECHR by interpreting and applying provisions of national law as far as possible in conformity with the ECHR and with the case-law of the ECtHR. In the United Kingdom, the courts are even obliged to interpret national law in such a way as to prevent violations of ECHR rights. In Belgium, Germany and France, where only the constitutional courts are empowered to judge the constitutionality of primary legislation, the constitutional courts appear to interpret national constitutional rights in the light of the ECHR and the case-law of

the ECtHR. This is in effect an indirect review of primary legislation for its compatibility with the ECHR provisions as interpreted by the ECtHR.

4. As far as the application of the case-law of the ECtHR by national courts is concerned, neither the nature of the constitutional system for the implementation of international law, nor the available constitutional powers appear to have much practical relevance. Whether the system is predominantly monist or predominantly dualist, the national courts always strive to implement the ECtHR's interpretations as carefully as possible. As a consequence, the judgments of the ECtHR have a great impact and influence on national case law in all the six states studied. It is far from true that in monist states, such as the Netherlands, France or Belgium, the application of ECtHR interpretation is much more servile and obedient than in dualist states such as the United Kingdom. The judgments of the ECtHR have equally great importance for national fundamental rights doctrines in dualist states.

Simultaneously, the courts in all the states studied have developed instruments to mitigate the effects of the implementation of the ECHR and to make ECtHR precedents more compliant with national law. The Dutch courts, just like courts in the other states studied, appear to bend and mould the ECtHR's doctrines, criteria and factors in such a way as to fit them into national law. If it turns out that an ECHR interpretation genuinely cannot be made compliant with national law, moreover, the courts may sometimes even decide not to endorse this interpretation. In addition, the courts in all states studied have shown themselves to be strongly aware of their constitutional position. They tend to defer to the national legislature and administrative bodies, leaving a wide margin of discretion to them, and they will hardly ever accept far-reaching interpretations of fundamental rights that are not strictly required by the ECtHR.

5. Broad and articulate debates on the impact of the ECtHR's case-law have surfaced in particular in the United Kingdom and in the Netherlands, although the debate there is framed in different terms,. In the other states studied there is less criticism of the ECtHR's approach and such criticism as there is, is less often expressed in the political arena and the media. Mostly, criticism in these states relates to individual, controversial judgments of the ECtHR.
It has appeared from this study that the ECtHR is best able to deal with the latter type of criticism. If national courts articulate express, well-reasoned objections to certain ECtHR interpretations, the ECtHR even regards this important and valuable. It then considers the national judgments as the basis for a dialogue between courts, in which controversies and critique are phrased in a way to which the ECtHR can properly respond. Those states in which the highest courts aim at an active, express dialogue with the ECtHR, like the United Kingdom and Germany, and whose case-law is easily accessible to the ECtHR's judges and registry, appear to be able to exert significant influence on the development of the ECtHR's jurisprudence. In the Netherlands, criticism is only rarely expressly voiced in judgments and the criticism raised is often only summarily reasoned. Furthermore, in the Netherlands, translations of national judgments are usually unavailable .

Conclusion

The nature of the constitutional system for the implementation of international law by means of national case-law is much less important in explaining the impact of international law than is often assumed. In all the states studied, the ECHR and the case-law of the ECtHR exert a great influence on national case-law, regardless of whether the system is predominantly monist (as in the Netherlands, France, Belgium and, to a certain extent, Germany) or predominantly dualist (as in the United Kingdom and Sweden). Moreover, the courts in all the states studied have instruments at their disposal that enable them to fit the ECHR provisions into their own, national law and to demarcate their own responsibilities from those of other constitutional powers. The ECtHR accepts this and even encourages national courts to actively seek the best way to protect the ECHR rights in their own legal sys-

tems. National courts were able to use this leeway to engage in an effective dialogue with the ECtHR, based on well-reasoned, accessible judgments.

DEEL I – BEVINDINGEN

IMPLEMENTATIE VAN HET EVRM EN DE UITSPRAKEN VAN HET EHRM IN DE NATIONALE RECHTSPRAAK – EEN RECHTSVERGELIJKEND ONDERZOEK

BEVINDINGEN

Janneke Gerards & Joseph Fleuren

1. Inleiding

1.1 De grote betekenis van het EVRM voor de Nederlandse rechtspraak

De invloed van het Europees Verdrag voor de Rechten van de Mens (EVRM) op het Nederlandse recht is groot. Belangrijke onderdelen van het Nederlandse recht, zoals het strafrecht, het personen- en familierecht en het algemene bestuursrecht, hebben in de loop van de jaren 80 en 90 sterke invloed ondergaan van het EVRM en de rechtspraak van het Europees Hof voor de Rechten van de Mens (EHRM).[1] Ook is er inmiddels een aanzienlijke impact op, bijvoorbeeld, het vreemdelingenrecht. Een in 2010 uitgevoerd onderzoek naar de rechtspraak en de wetgevingsadviezen van de Raad van State heeft uitgewezen dat daarin zelfs vaker wordt verwezen naar de bepalingen van het EVRM dan naar de grondrechtenbepalingen uit de Nederlandse Grondwet.[2]

Er zijn verschillende oorzaken aan te wijzen voor deze grote betekenis van het EVRM voor het Nederlandse recht. Allereerst is het de Nederlandse rechter niet toegestaan om wetten in formele zin te toetsen aan de Grondwet (art. 120 Gw). Daar staat tegenover dat de rechter op grond van de art. 93 en 94 van de Grondwet formele wetgeving en zelfs de Grondwet buiten toepassing moet laten in geval van strijd met een 'een ieder verbindende bepaling' van een internationaal verdrag, zoals het EVRM.[3] In zaken over grondrechten waarin formele wetgeving centraal staat, ligt het daardoor voor de hand dat het EVRM tot uitgangspunt wordt gekozen, in plaats van de nationale grondrechtenbepalingen. Dit lijkt vervolgens een 'doorvertaaleffect' te hebben gekregen, in die zin dat de rechter zo vertrouwd is geraakt met het EVRM dat hij ook in zaken waar geen formele wetgeving, maar lagere regelgeving of beschikkingen ter discussie staan, bij voorkeur aan dit verdrag toetst. Daarnaast heeft het EVRM voor rechterlijke toetsing inhoudelijke voordelen boven de grondwettelijke bepalingen. Dit komt vooral doordat er in het EVRM relatief duidelijke materiële vereisten voor beperking en regulering van grondrechten vastliggen. Deze vereisten zijn bovendien in de rechtspraak van het EHRM vergaand en specifiek uitgewerkt. In de Grondwet ontbreken dergelijke materiële vereisten, een nadeel waarop ook de Staatscommissie Grondwet in haar in 2010 uitgebrachte rapport heeft gewezen.[4] Voor rechters biedt het EVRM daardoor een bruikbaarder aangrijpingspunt dan de Nederlandse Grondwet.[5] Ook voor beleidsvorming, bestuur en wetgeving vormt het EVRM een belangrijk

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[1] Een inmiddels klassiek geworden studie over de welwillende houding die de Nederlandse rechter vanaf de jaren 80 jegens het EVRM heeft ingenomen is P. van Dijk, 'De houding van de Hoge Raad jegens de verdragen inzake de rechten van de mens', in: *De plaats van de Hoge Raad in het huidige staatsbestel*, Zwolle: W.E.J. Tjeenk Willink 1988, p. 173-209. Een nadere analyse van de invloed van het EVRM op het nationale materiële recht zal ook verschijnen in J.H. Gerards & C. Sieburg (red.), *Fundamentele rechten in het materiële recht*, Deventer: Kluwer 2013, te verschijnen.

[2] Zie J.H. Gerards, W.J.M. Voermans e.a., Juridische betekenis en reikwijdte van het begrip "rechtsstaat" in de legisprudentie & jurisprudentie van de Raad van State, Den Haag: Raad van State 2011.

[3] Zie over de art. 93 en 94 Gw: J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* (diss. Nijmegen), Den Haag: Boom Juridische uitgevers 2004.

[4] Staatscommissie Grondwet, *Rapport van de Staatscommissie Grondwet*, Den Haag, november 2010, *Kamerstukken II* 2010/11, 31570, nr. 17 (bijlage).

[5] Zie voor een nadere analyse J.H. Gerards, 'Oordelen over grondrechten – rechtsvinding door de drie hoogste rechters in Nederland', in: H. den Tonkelaar en L. de Groot (red.), *Rechtsvinding op veertien terreinen*, Deventer: Kluwer 2012, p. 9-51.

kader, in de eerste plaats door de bindende werking van de arresten die het EHRM tegen Nederland heeft gewezen, maar ook door de betekenis van de overige jurisprudentie van het EHRM voor de uitleg van de fundamentele rechten. Voor Nederland is daarmee het belang van het EVRM voor de nationale rechtsorde goed verklaarbaar.

1.2 Discussies over de doorwerking van internationaal recht, in het bijzonder het EVRM en de EHRM-rechtspraak

De betekenis van het EVRM en de EHRM-rechtspraak voor het Nederlandse recht is niet alleen bijzonder groot, maar ook breed geaccepteerd. Lange tijd is er nauwelijks serieuze discussie geweest over de mate van beïnvloeding van het nationale recht door het EVRM, al waren er soms uitspraken van het EHRM die tot controverse leidden. Daarbij stond de legitimiteit van de door het EHRM gekozen (evolutieve) uitleg van het EVRM buiten kijf. Sinds een jaar of drie is er echter een dieper en breder debat ontstaan over de impact van het EVRM, zowel tussen wetenschappers als in de politiek.[6] In dit debat zijn verschillende punten naar voren gebracht, waarvan sommige in het bijzonder betrekking hebben op het EVRM en de EHRM-rechtspraak en de invloed daarvan op de nationale rechtsorde, terwijl andere meer algemeen betrekking hebben op de doorwerking van het internationale recht in de nationale rechtspraak. De belangrijkste discussies hierover kunnen als volgt worden samengevat.

Een eerste discussie betreft de betekenis van de EHRM-rechtspraak voor het Nederlandse recht, in het bijzonder de Nederlandse rechtspraak. Daarbij wordt wel gewezen op de evolutieve interpretatie door het EHRM, die tot resultaat heeft dat de reikwijdte van de EVRM-rechten in de loop van de tijd sterk is vergroot. De invloed van het EVRM op het nationale recht is volgens sommige deelnemers aan het debat dienovereenkomstig toegenomen, terwijl het in sommige gevallen gaat om minder belangrijke grondrechten. Enkelen vinden dat in deze gevallen Europees toezicht minder op zijn plaats is. Anderen zijn van mening dat het hier gaat om kwesties die niet door een (Europese of nationale) rechter zouden moeten worden beslecht, maar die meer in algemene zin zouden moeten worden gereguleerd door de wetgever. Deze discussie betreft daarmee niet alleen de vraag naar de doorwerking van het EVRM in het nationale recht, maar ook de meest wenselijke verhouding tussen wetgever en rechter waar het gaat om de bescherming van grondrechten.

Een tweede discussie vertrekt eveneens vanuit de aanname dat het EVRM en de EHRM-rechtspraak een grote invloed hebben gekregen, maar richt zich in het verbinden van consequenties daaraan niet zozeer op de positie van het EHRM of de Nederlandse rechter, maar eerder op de Nederlandse Grondwet. De stelling is daarbij dat de grote aandacht voor de internationale grondrechten en het EVRM afbreuk doen aan de eigen Grondwet. Daaraan zou meer betekenis moeten toekomen en Nederland zou zijn primaire taak tot bescherming van de grondrechten serieuzer moeten nemen. Om dit te bereiken zou moeten worden nagedacht over andere wijzigingen van de Grondwet om deze een sterkere normatieve of symboolwaarde te geven. Daarbij kan worden gedacht aan het toevoegen van een algemene bepaling (of een preambule), aan het toevoegen van nieuwe grondrechten of het opheffen van het verbod om wetten in formele zin te toetsen aan de in de Grondwet vervatte grondrechten.

[6] Zie voor een vrij recent overzicht van de kritieken de inleiding van Gerards en Terlouw en de verschillende bijdragen in: J.H. Gerards & A.B. Terlouw (red.), *Amici Curiae. Adviezen aan het Europees Hof voor de Rechten van de Mens*, Nijmegen: Wolf Legal Publishers 2012. Een nader overzicht van de kritiek is te vinden in het Nederlandse landenrapport voor deze studie (zie deel II van dit rapport). Een recente toevoeging aan het debat is een door de PVV ingediende motie waarin de regering wordt verzocht om het EVRM op te zeggen (motie-Helder over opzegging van het EVRM (*Kamerstukken II* 2012/13, 33400-VI, nr. 93), verworpen); zie verder het verslag van het debat over de uitspraken van het EHRM in de plenaire vergadering van de Tweede Kamer, 13 maart 2013.

Een laatste discussie betreft in meer algemene zin de doorwerking van het internationale recht in de nationale rechtsorde. In deze discussie is wel bepleit dat de Nederlandse rechtsorde zich teweer moet kunnen stellen tegen de automatische doorwerking van het internationale recht. Zo stelde een deel van de Staatscommissie Grondwet voor om de Grondwet aan te vullen met een bepaling die het de rechter mogelijk zou maken om geen voorrang toe te kennen aan internationale regelgeving of internationale uitspraken die evident in strijd komen met de fundamentele constitutionele beginselen die aan de Nederlandse grondwettelijke ordening ten grondslag liggen.[7] Vanuit de VVD-fractie in de Tweede Kamer is een wetsvoorstel aanhangig gemaakt dat beoogt de artikelen 93 en 94 van de Grondwet zo te wijzigen dat de rechter niet langer bevoegd is om formele wetgeving en de Grondwet te toetsen aan rechtstreeks werkende bepalingen van verdragen. Bovendien wil dit initiatiefvoorstel-Taverne de wetgever de mogelijkheid geven om het oordeel over de vraag of een verdragsbepaling rechtstreeks werkt, aan de rechter te onttrekken.[8] Binnen deze discussie zijn er duidelijk verschillende lijnen. Waar het minderheidsstandpunt van de staatscommissie de bevoegdheid om doorwerking van internationaal recht te blokkeren bij de rechter wil neerleggen, wil het voorstel-Taverne deze bevoegdheid juist bij de rechter weghouden. Dit debat sluit dan ook aan bij de eerste van de genoemde drie discussies, die betrekking heeft op de vraag bij wie het primaat bij het reguleren van grondrechten zou moeten liggen: bij de (internationale of nationale) rechter, of bij de nationale wetgever.

Deze drie discussies zijn merendeels van bredere aard en betreffen niet alleen de doorwerking van het EVRM en de EHRM-rechtspraak. Tegelijkertijd zijn in de afgelopen twee jaar in veel van de debatten de positie en de legitimiteit van het EHRM tot uitgangspunt genomen. Enerzijds nemen de verschillende deelnemers aan de discussie de doorwerking van het EVRM en de sterke invloed van het EHRM op het nationale recht vaak als voorbeeld. Anderzijds komen de hierboven genoemde discussies en de materiële inzet daarvan steeds weer aan de orde in concrete debatten over de toekomst van het EHRM. Over dat laatste onderwerp hebben Nederlandse politici en wetenschappers vooral stevig gedebatteerd in 2011 en 2012, toen het erom ging de Nederlandse regeringsinzet te bepalen bij de intergouvernementele conferentie over de toekomst van het EHRM in Brighton. Die top is inmiddels voorbij en heeft geresulteerd in enkele concrete voorstellen tot verandering, die momenteel worden uitgewerkt.[9] Recent, in maart 2013, bleek tijdens een debat in de Tweede Kamer echter dat uitspraken van het EHRM nog steeds aanleiding kunnen geven tot politiek rumoer, zeker als ze nauw verbonden zijn met actuele politieke onderwerpen.[10] De meningen over de invloed van de EHRM-rechtspraak, over de betekenis van de eigen Grondwet en over de eventuele begrenzing van de doorwerking van het internationale recht zijn nog lang niet uitgekristalliseerd

[7] Reeds aangehaald (noot 4). Zie ook de discussiebijdragen van J.W.A. Fleuren en J.H. Gerards in *Rechtsgeleerd Magazijn Themis* 2011 (3), p. 117-123.

[8] S. Blok, K. Dijkhoff & J. Taverne, 'Verdragen mogen niet langer rechtstreeks werken', *NRC* 23 februari 2012; dit voorstel is inmiddels uitgewerkt in een initiatiefvoorstel: *Kamerstukken II* 2011/12, 33 359 (R 1986), nrs. 1-3. Zie voor een kritische bespreking van dit voorstel en de Memorie van Toelichting J. Fleuren en J. de Wit, 'Het voorstel-Taverne. Schrapping van de rechterlijke bevoegdheid om wetten aan verdragen te toetsen', *Nederlands Juristenblad* 2012 (40), p. 2812-2818.

[9] Zie vooral de conceptvoorstellen voor twee nieuwe protocollen bij het EVRM, Protocol nr. 15 en nr. 16, waarin onder meer een wijziging is opgenomen van de preambule waardoor de *margin of appreciation*-doctrine en het subsidiariteitsbeginsel zullen worden vastgelegd en enkele aanpassingen van de ontvankelijkheidsvereisten. De meest recente publieke informatie hierover is te vinden via: www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/ (laatstelijk geraadpleegd 11 maart 2013).

[10] Zie verslag plenair debat Tweede Kamer 13 maart 2013 en door de PVV ingediende motie waarin de regering wordt verzocht om het EVRM op te zeggen (motie-Helder over opzegging van het EVRM (*Kamerstukken II* 2012/13, 33400-VI, nr. 93), verworpen).

1.3 Centrale doelstelling van het onderzoek; onderzoeksvragen

Centrale doelstelling

In het licht van de hierboven geschetste context heeft het WODC, op verzoek van de Directie Wetgeving en Juridische Zaken van het Ministerie van Veiligheid en Justitie, opdracht gegeven tot een onderzoek naar het verband tussen, aan de ene kant, het nationale rechtsstelsel en de plaats van het EVRM daarin, en, aan de andere kant, de wijze waarop en mate waarin de nationale rechter toetst aan, of anderszins rekening houdt met, het EVRM en de jurisprudentie van het EHRM. Hierbij wordt ook de vraag betrokken in hoeverre en op welke manier de toepassing van het EVRM door de nationale rechter in het nationale rechtssysteem tot discussie leidt.

Zoals in par. 1.1 is opgemerkt, is er in Nederland een duidelijk verband tussen enerzijds het eigen rechtsstelsel en de plaats van het EVRM daarin, en anderzijds de mate waarin rechters met het EVRM en de jurisprudentie van het EHRM vertrouwd zijn geraakt. Dit lijkt een typerende situatie voor Nederland te zijn. De vraag is echter of de toepassing van het EVRM door de nationale rechter echt een andere is naarmate de positie van de rechter een andere is, bijvoorbeeld omdat constitutionele toetsing mogelijk is of omdat het EVRM geen voorrang heeft op 'acts of parliament'. Een andere vraag is of het bestaan van een ander systeem leidt tot minder of andersoortige discussies over de betekenis van het EVRM en de uitleg en toepassing die het EHRM aan dit verdrag geeft. Daarnaast is het denkbaar dat de grootte van de impact niet zozeer samenhangt met nationale constitutionele systemen, als wel met de eisen die uit het EVRM en de EHRM-rechtspraak als zodanig voortvloeien. Anders gezegd: de impact van de EHRM-rechtspraak in het nationale recht lijkt sterk samen te hangen met het constitutionele stelsel van doorwerking van internationaal recht en van rechterlijke competenties, maar of dat daadwerkelijk het geval is, moet nader worden onderzocht.

Onderzoeksvragen

In het licht van het bovenstaande concentreert de voorliggende studie zich op een vijftal sets van concrete, nauw met elkaar samenhangende onderzoeksvragen:

1. Welke eisen stelt het EHRM aan de nationale doorwerking van het EVRM en de toepassing van de EHRM-rechtspraak? Welke interpretatieve benaderingen kiest het Hof en welke invloed gaat daarvan uit voor het nationale recht? In hoeverre laten deze benaderingen ruimte voor nationale verschillen en voor eigen keuzes van nationale wetgevers, bestuursorganen en rechters? Hoe stelt het Hof zichzelf op als het gaat om nationale kritiek en in hoeverre beïnvloedt dergelijke kritiek de rechtspraak van het EHRM?
2. Op welke wijze voorziet het constitutioneel recht in de doorwerking van het internationaal recht in het algemeen, en van het EVRM in het bijzonder, in de nationale rechtsorde? Welke status heeft het EVRM in de nationale rechtsorde?
3. Welke bevoegdheden en technieken gebruiken nationale rechters om te bevorderen dat de staat voldoet aan zijn verplichtingen onder het EVRM? Hoe zijn deze bevoegdheden en technieken ingebed in het nationale constitutionele recht? Hoe verhouden de nationale rechterlijke interpretatie en toepassing van het EVRM zich tot de rol van nationale grondrechten, bijvoorbeeld constitutionele rechten?
4. Hoe gaan nationale rechters om met de rechtspraak van het EHRM? Passen zij deze zonder meer toe of zijn er soms aanpassingen aan het nationale recht? Wat is de invloed van de interpretatieve benaderingen van het EHRM? Nemen zij deze over of blijven zij hun nationale recht tot uitgangspunt kiezen?
5. In welke mate zijn er op nationaal niveau discussies over het EHRM en zijn jurisprudentie? Als zij er zijn, wat is dan de oorsprong en de aard van deze discussies? Hebben de discussies invloed op de nationale rechtspraak, of op constitutionele discussies over bevoegdheden van de nationale rechter?

Om deze vragen te kunnen beantwoorden, is voor de onderhavige studie gekozen voor een tweeledige onderzoeksopzet.

1 – Onderzoek naar werkwijze en rechtspraak van het EHRM
In de eerste plaats is onderzoek gedaan naar de werkwijze en rechtspraak van het EHRM en naar de reactie van het EHRM op discussies in de staten over deze rechtspraak. De reden daarvoor is dat de grote impact van de EHRM-rechtspraak op het nationale recht mogelijk niet zozeer zijn verklaring vindt in het nationale constitutionele recht, als wel (mede) in de eisen die het EVRM en de EHRM-rechtspraak aan nationale rechters stelt.

Om te kunnen achterhalen hoe vergaand deze eisen zijn en welke speelruimte nationale rechters op grond van het EVRM nog hebben, is op basis van de rechtspraak van het EHRM in de afgelopen vijftien jaar nagegaan welke eisen het EHRM stelt, hoe het door middel van zijn rechtsvindingsmethoden de nationale rechtspraak beïnvloedt en hoeveel ruimte het daarbij overlaat aan nationale rechters. Daarnaast is onderzocht hoe het EHRM omgaat met nationale discussies over zijn uitspraken en interpretaties. Daarbij is zowel gekeken naar de respons van rechters (die bijvoorbeeld uitspraken of interpretaties weigeren te volgen, of deze juist volgen), als naar de reacties van politici en wetenschappers en reacties vanuit de media. Dit onderzoek is zowel gebaseerd op een uitvoerige literatuur- en jurisprudentiestudie, als op kwalitatieve diepte-interviews met zes rechters en drie griffiers van het EHRM. Op die manier is een beeld gecreëerd van de dynamiek die bestaat tussen het EVRM en het EHRM enerzijds, en de staten en de nationale rechters anderzijds. Een dergelijk beeld kan helpen bij het duiden en beoordelen van nationale ontwikkelingen.

2 – Rechtsvergelijkend onderzoek naar de doorwerking van het EVRM in de nationale rechtspraak
In de tweede plaats is een uitvoerig rechtsvergelijkend onderzoek verricht naar de wijze waarop het internationale recht, en dan in het bijzonder het EVRM en de EHRM-rechtspraak, doorwerkt in de nationale rechtspraak. Op basis van een uitvoerige questionnaire hebben experts voor zes verschillende staten (België, Duitsland, Frankrijk, Nederland, het Verenigd Koninkrijk en Zweden) onderzocht welke bevoegdheden rechters hebben tot toetsing van wetgeving en bestuursbesluiten aan internationale verdragen en aan de Grondwet, wat de juridische status is van internationaal recht in de nationale rechtsorde, welke bevoegdheden nationale rechters hebben tot toepassing van EHRM-rechtspraak in het nationale recht en hoe nationale rechters van die bevoegdheden gebruikmaken. Ook is nagegaan in hoeverre EHRM-rechtspraak voor de nationale rechters toegankelijk is en hoe wordt bijgedragen aan de kennis van het EVRM en de Straatsburgse rechtspraak. Naast de juridische bevoegdheden kunnen dergelijke feitelijke omstandigheden immers van invloed zijn op de betekenis van de EHRM-rechtspraak voor de nationale rechtspraak. Daarnaast is onderzocht of er in de verschillende staten discussie bestaat over het EHRM en zijn uitspraken en, zo ja, welke vorm deze discussie heeft aangenomen. Daarbij is steeds ook bekeken of en in hoeverre discussies over het EHRM zich vertalen naar de nationale rechtspraak en naar discussies over de constitutionele rol van de nationale rechter.

1.4 Verantwoording van de landenkeuze voor het rechtsvergelijkend onderzoek

Hiervoor is aangegeven dat het rechtsvergelijkend onderzoek zich heeft gericht op zes verschillende staten: België, Duitsland, Frankrijk, Nederland, het Verenigd Koninkrijk en Zweden. Uiteraard kan de vraag opkomen waarom juist voor deze zes staten is gekozen. Bij de selectie heeft voorop gestaan dat er ruimte moest bestaan voor een diepgaande analyse van het nationale recht en dat sprake moest zijn van een goede vergelijkbaarheid van de uitkomsten van de nationale onderzoeken. De geformuleerde onderzoeksvragen vragen hierbij om een maximale variatie in constitutionele instrumenten

en mechanismen. Gelet daarop zijn de vier volgende inhoudelijke criteria gehanteerd om te bepalen welke staten zouden worden onderzocht:

1. Het project vertrekt vanuit het gegeven dat er in Nederland een brede en diepe discussie bestaat over de impact van het EVRM en de EHRM-rechtspraak op het nationale recht. Onderzocht moet onder meer worden welke impact dergelijke discussies hebben op bredere constitutionele debatten over de rechterlijke bevoegdheden bij doorwerking van internationaal recht. Om die reden moeten in ieder geval stelsels in het onderzoek worden betrokken waarin er discussie bestaat over de rechterlijke toepassing van het EHRM, hetzij in de zin dat er kritiek is op bepaalde uitspraken van het EHRM, hetzij in de zin dat wetenschappers, rechters of politici zich kritisch hebben uitgesproken over de doorwerking van het EVRM of de EHRM-rechtspraak.
2. Om interessant te zijn voor deze studie dient een staat een sterke traditie te hebben van EVRM-toepassing en moet er voldoende rechtspraak bestaan om ontwikkelingen zichtbaar te kunnen maken in de acceptatie of verwerping van EHRM-rechtspraak. De beschikbaarheid van zo'n traditie is nodig om te kunnen bepalen of en in hoeverre de rechtspraakbenaderingen van het EHRM invloed hebben op de nationale beoordelingscriteria, de intensiteit van de nationale toetsing en de interpretatieve methoden en beginselen. Alleen in 'oude' verdragsstaten zal bovendien goed zichtbaar zijn of er een relatie is tussen de ontwikkeling en het gebruik van constitutionele mechanismen voor rechterlijk toezicht en rechterlijke implementatie van internationaal recht en de ontwikkelingen in de rechtspraak van het EHRM.
3. Een staat is voor deze studie alleen het bestuderen waard als er een constitutioneel debat bestaat over de relatie tussen rechter en wetgever en over de relatie tussen nationaal en internationaal recht. In het bijzonder moet er een goed ontwikkeld discours bestaan met betrekking tot de doorwerking van internationaal recht door middel van rechtspraak. Dit is nodig om veranderingen te kunnen waarnemen en verklaren als het gaat om rechterlijke toepassing van het EVRM en om de daadwerkelijke impact van het EVRM op het nationale recht te kunnen vaststellen.
4. Bij de selectie moet worden gestreefd naar een zo groot mogelijke variatie in doorwerkingsmodellen (variërend van (sterk) monistisch tot (sterk) dualistisch) en rechterlijke toetsingsbevoegdheden (variërend van het ontbreken van een mogelijkheid tot constitutionele en verdragstoetsing tot het aanwezig zijn daarvan, en variërend tussen verschillende modellen van toetsing (anterieur of posterieur, gespreid of juist niet)). Op die manier kan het beste worden onderzocht welke relaties er bestaan tussen de keuze voor bepaalde modellen, de wijze en mate van doorwerking van internationaal recht (in het bijzonder het EVRM en de EHRM-rechtspraak) en eventuele discussies over (de impact van) het EVRM en de EHRM-rechtspraak.

Gelet op deze criteria is ervoor gekozen om België, Duitsland, Frankrijk, Nederland en het Verenigd Koninkrijk in de selectie van staten te betrekken. De zes geselecteerde staten vormen een ideale proeftuin om de relatie te onderzoeken tussen constitutionele mechanismen voor de doorwerking van internationaal recht, het effect van het EVRM en de EHRM-rechtspraak op nationale rechterlijke oordeelsvorming, en de discussies over het EHRM en zijn rechtspraak. Alle geselecteerde staten kennen een sterke traditie van EVRM-toepassing en overal bestaat er een interessant discours over constitutionele toetsing en de implementatie van internationaal recht door nationale rechters. Bovendien kunnen in alle staten discussies worden verwacht over de rol van de rechter, over de rechtspraak van het EHRM en over de impact daarvan op de nationale rechtsorde, zij het dat de omvang en intensiteit van die discussies nader moeten worden onderzocht.

De selectie voldoet bovendien aan het vereiste van een zo groot mogelijke diversiteit. Zij omvat drie staten met een (gematigd) monistisch systeem van internationaal recht (België, Frankrijk en Nederland) en drie staten met een (gematigd) dualistisch systeem (Duitsland, het Verenigd Koninkrijk en Zweden). Waar alle drie de monistische stelsels een systeem kennen van gedecentraliseerde rechterlijke toetsing van de verenigbaarheid van formele wetgeving met het EVRM, bestaan er tussen de drie dualistische stelsels grote verschillen. In Duitsland is alleen het *Bundesverfassungsgericht*

bevoegd om de verenigbaarheid van formele wetgeving met het EVRM te toetsen; in Zweden kan iedere rechter een wet buiten toepassing laten bij strijd met het EVRM; en in het Verenigd Koninkrijk zijn de hoogste rechters bevoegd om een 'verklaring van onverenigbaarheid' af te geven als zij strijd constateren van een wettelijke regeling met een EVRM-bepaling. Minstens zo interessant is dat de zes geselecteerde staten sterke verschillen laten zien waar het gaat om constitutionele toetsing: het Verenigd Koninkrijk en Nederland voorzien niet in een constitutioneel hof en in constitutionele toetsing van acts of parliament dan wel formele wetgeving, terwijl België, Duitsland, Frankrijk en Zweden wel constitutionele toetsing toelaten, maar heel verschillende systemen voor de inrichting hiervan kennen. Gelet op dit alles waarborgt deze selectie een relevante en waardevolle rechtsvergelijking.

1.5 Aanpak

Hiervoor, in par. 1.3, is aangegeven dat de onderhavige studie uiteenvalt in twee hoofdprojecten: een onderzoek naar het EVRM en de EHRM-rechtspraak en een rechtsvergelijkend onderzoek naar de doorwerking van het EVRM in een zestal staten. De gekozen onderzoeksaanpak is voor de beide onderzoeksprojecten verschillend.

Aanpak EVRM-onderzoek

Het EVRM-onderzoek heeft bestaan uit een uitgebreid onderzoek van de jurisprudentie van het EHRM over de afgelopen vijftien jaar om te achterhalen welke eisen het EHRM in deze rechtspraak stelt aan de toepassing van het EVRM en de EHRM-interpretaties door de nationale rechter, en om te zien welke ruimte het EHRM de nationale rechter biedt voor eigen rechtstoepassing en het geven van een eigen invulling aan het EVRM. Dit rechtspraakonderzoek is aangevuld met een serie interviews met griffiers en rechters van het EHRM. Daarbij is niet alleen gevraagd naar de perceptie van de invloed van het EVRM op de nationale rechtspraak, maar ook naar de dialoog met nationale rechters en naar de omgang met kritiek op het EHRM en diens uitspraken. Een nadere verantwoording van de daarbij gehanteerde onderzoeksmethoden is te vinden in het voor dit onderzoek opgestelde rapport. Dit onderzoek is uitgevoerd door prof. mr. J.H. (Janneke) Gerards, hoogleraar fundamentele rechten aan de Radboud Universiteit Nijmegen en een van de projectleiders van de voorliggende studie.

Aanpak van het rechtsvergelijkend onderzoek

Voor het rechtsvergelijkend onderzoek zijn nationale experts aangezocht op het terrein van fundamentele rechten en de rechterlijke implementatie van internationaal recht (in bijzonder het EVRM). De volgende experts hebben aan het onderzoek deelgenomen:

België

- Prof. mr. P. (Paul) Lemmens, Hoogleraar rechten van de mens, Katholieke Universiteit Leuven, Instituut voor de Rechten van de Mens; sinds 1 oktober 2012 rechter in het Europees Hof voor de Rechten van de Mens
- Prof. mr. K. (Koen) Lemmens, Hoogleraar rechten van de mens, Katholieke Universiteit Leuven, Instituut voor de Rechten van de Mens; senior docent rechtsvergelijking, Vrije Universiteit Brussel
- Mr. G. (Guan) Schaiko, Onderzoeker aan de Katholieke Universiteit Leuven

Duitsland

- Prof. dr. E. (Eckart) Klein, Hoogleraar constitutioneel, internationaal en Europees recht, Universiteit van Potsdam, Centrum voor de Rechten van de Mens

Frankrijk

- Dr. C. (Céline) Lageot, Senior onderzoeker publiekrecht, Universiteit van Poitiers, Onderzoekscentrum voor internationale samenwerking

Nederland
– Prof. mr. J.H. (Janneke) Gerards, Hoogleraar fundamentele rechten, Radboud Universiteit Nijmegen (projectleider)
– Mr. dr. J.W.A. (Joseph) Fleuren, Universitair hoofddocent algemene rechtswetenschap, Radboud Universiteit Nijmegen (projectleider)

Verenigd Koninkrijk
– R. (Roger) Masterman, LLB, LLM, AKC, Senior onderzoeker, Universiteit van Durham, Centrum voor de Rechten van de Mens

Zweden
– Prof. dr. Th. (Thomas) Bull, Hoogleraar constitutioneel recht, Universiteit van Uppsala; sinds 1 januari 2013 raadsheer in de Hoge Raad van Zweden
– Prof. dr. I. (Iain) Cameron, Hoogleraar internationaal publiekrecht, Universiteit van Uppsala; lid van de Venetië-commissie (Council of Europe Commission on Democracy through law)

Op basis van de hiervoor in par. 1.3 weergegeven onderzoeksvragen en op basis van een voorstudie naar de impact van het EVRM op het nationale recht en de nationale rechtspraak, hebben de projectleiders een concept-questionnaire opgesteld ten behoeve van de landenrapporten. Aan de hand van een dergelijke vragenlijst kan worden verzekerd dat voor alle stelsels voldoende vergelijkbare informatie beschikbaar komt. De concept-questionnaire is uitgebreid besproken in een intensieve rondetafelbijeenkomst met de experts op 1 juli 2012. Daardoor is gegarandeerd dat de questionnaire de relevante vragen bevat en dat deze vragen duidelijk en begrijpelijk zijn voor alle onderzochte systemen. Naar aanleiding van deze rondetafelsessie zijn verschillende aanpassingen gemaakt in de questionnaire en is een defininitieve versie opgesteld. Deze is bij de onderhavige studie gevoegd als bijlage. De experts hebben vervolgens de vragen van de questionnaire concreet beantwoord aan de hand van een eigen, nationale studie van de relevante literatuur en jurisprudentie. Voor het schrijven van de landenrapporten zijn geen interviews verricht.

Op 1 februari 2013 zijn eerste concepten van de ingevulde questionnaires besproken tijdens een tweede rondetafelbijeenkomst met de experts en zijn de antwoorden vergeleken. Doel van de bijeenkomst was om te verzekeren dat de vragen op een vergelijkbare manier zijn begrepen en beantwoord, ter bevordering van de coherentie van de eindrapportage en ter vergroting van de vergelijkbaarheid van de landenrapporten. Het tweede doel was om te discussiëren over mogelijke verklaringen voor verschillen en overeenkomsten in nationale benaderingen en om te zoeken naar antwoorden op de centrale vragen voor het onderzoek. Deze bespreking heeft, samen met de landenrapporten, een belangrijke basis gevormd voor de bevindingen van deze studie. De experts hebben vervolgens nog gelegenheid gekregen om hun concepten nader aan te vullen en uit te werken.

Ten slotte is van belang te vermelden dat de studie is ondersteund door een vanuit het WODC samengestelde begeleidingscommissie, die bestond uit de volgende leden:

– mr. P. (Pieter) van Dijk, Raad van State (voorzitter)
– mr. M. (Martin) Kuijer, ministerie van Veiligheid en Justitie / DWJZ
– prof.mr.dr. R. (René) Lefeber, ministerie van Buitenlandse Zaken
– dr. E. (Elaine) Mak, Erasmus Universiteit Rotterdam
– mr. P.B.C.D.F. (Paul) van Sasse van Ysselt, ministerie van Binnenlandse zaken en Koninkrijksrelaties / CZW
– mr. E.C. (Corine) van Ginkel, ministerie van Veiligheid en Justitie / WODC

De begeleidingscommissie heeft verschillende malen met de projectleiders gesproken over de opzet en inhoud van het onderzoek en heeft ideeën aangedragen en adviezen gegeven voor de questionnai-

re voor het rechtsvergelijkend onderzoek en voor het onderzoek naar het EVRM en de EHRM-rechtspraak. Gedurende de studie is dankbaar gebruik gemaakt van de waardevolle input van de begeleidingscommissie.

1.6 Indeling van het rapport

De studie naar de doorwerking van het EVRM en de EHRM-rechtspraak in het nationale recht, in het bijzonder in de nationale rechtspraak, heeft een zevental afzonderlijke rapporten opgeleverd: een rapport met betrekking tot het EVRM en de EHRM-rechtspraak en zes landenrapporten over de doorwerking van internationaal recht (in het bijzonder het EVRM en de EHRM-rechtspraak) in het nationale recht. Deze rapporten zijn ieder in zichzelf het lezen waard en bevatten belangwekkende en interessante conclusies. Zij vormen deel II van dit rapport.

Deel I van het rapport beoogt eerst en vooral een synthese te geven van de bevindingen uit de verschillende delen van het onderzoek, waarbij steeds wordt gezocht naar overeenkomsten en verschillen. Dit eerste deel van het rapport is als volgt opgebouwd. Allereerst wordt in par. 2 ingegaan op de constitutionele mechanismen die in de verschillende staten beschikbaar zijn voor de doorwerking van internationaal recht. Daarbij wordt zowel aandacht besteed aan de status van internationale normen en aan hun doorwerking in nationale rechtspraak in algemene zin, als aan de status en inroepbaarheid van het EVRM. Vervolgens wordt in par. 3 ingezoomd op de omgang met de uitspraken en de ontvankelijkheidsbeslissingen van het EHRM, waarbij zowel aandacht wordt besteed aan de eisen die het EHRM op dit punt stelt als aan de manier waarop de EHRM-rechtspraak in het nationale recht van de onderzochte staten wordt geïmplementeerd. Daarna besteedt par. 4 aandacht aan de discussies over de rechtspraak van het EHRM. Daarbij wordt zowel aandacht besteed aan het perspectief van het EHRM op de discussies en aan de manier waarop het EHRM daarmee omgaat, als aan de aard van de discussies op nationaal niveau. Ten slotte gaat par. 5 in op twee praktische factoren die de doorwerking van het EVRM en de wisselwerking tussen EVRM en nationaal recht kunnen beïnvloeden, namelijk enerzijds de toegankelijkheid van EHRM-uitspraken voor nationale rechters en de bekendheid van nationale rechters met het EHRM en het EVRM en anderzijds de bekendheid van het EHRM met de uitspraken van de nationale rechters.

Na deze synthese van de bevindingen uit de verschillende rapporten sluiten wij dit eerste deel in par. 6 af met een aantal algemene conclusies met betrekking tot de doorwerking van het EVRM in het nationale recht. Daarin geven wij tevens een antwoord op de centrale vragen van de onderhavige studie.

2. De status van het internationaal recht, in het bijzonder het EVRM, in de nationale rechtsorde

2.1 Een globaal schema: monistische en dualistische systemen

Elke staat is gehouden zijn internationaalrechtelijke verplichtingen na te komen. Of deze nu voortvloeien uit een verdrag, een besluit van een volkenrechtelijke organisatie of een regel van internationaal gewoonterecht, een staat kan zich niet op zijn nationale recht beroepen om zich aan het internationaal recht te onttrekken.[11] Dit betekent dat een staat er voortdurend zorg voor moet dragen dat

[11] Art. 26 en 27 Verdrag van Wenen inzake het verdragenrecht (WVV). Zie vooral ook art. 3 en 32 van de door de International Law Commission (ILC) opgestelde 'Articles on responsibility of States for internationally wrongful acts' (bijlage bij resolutie 56/83 van de Algemene Vergadering van de Verenigde Naties) en het door de ILC vastgestelde commentaar op deze artikelen (*Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 36-38 en 94). De in art. 27 j° art. 46 WVV vervatte uitzondering op de regel dat een verdragspartij zich niet mag beroepen op zijn nationaal recht om de niet ten uitvoerlegging van een verdrag te rechtvaardigen, is voor dit rapport niet van belang en blijft hier om die reden onbesproken.

zijn nationale rechtsorde in overeenstemming is met zijn internationaalrechtelijke verplichtingen. Zeer veel normen van internationaal recht raken immers direct aan de inrichting en inhoud van het nationaal recht. Naast het recht van de Europese Unie, valt onder meer te denken aan normen over de bestraffing van misdaden tegen de menselijkheid, resoluties die het opleggen van economische sancties voorschrijven, uitleveringsverdragen, mensenrechtenverdragen, verdragen ter vermijding van dubbele belasting, en verdragen op het terrein van sociaal zekerheidsrecht, het vreemdelingenrecht, het internationaal privaatrecht en het eenvormig privaatrecht. Er is geen enkel rechtsgebied dat niet de invloed van het internationaal recht heeft ondergaan. Het EVRM is in dit verband een schoolvoorbeeld. Dit verdrag stelt minimumeisen aan de grondrechtenbescherming in de lidstaten van de Raad van Europa. De bepalingen van dit verdrag, die door het EHRM evolutief worden uitgelegd, dwingen lidstaten regelmatig tot aanpassingen in hun nationaal recht en tot het achterwege laten van veranderingen die niet met dit verdrag stroken.[12]

Bij de huidige stand van het volkenrecht mag iedere staat in beginsel zelf kiezen op welke wijze of wijzen hij zijn nationale rechtsorde in overeenstemming brengt met zijn internationale verplichtingen.[13] Dit laat onverlet dat twee of meer staten bij verdrag kunnen overeenkomen dat zij bij of krachtens het verdrag vastgestelde bepalingen op een nader voorgeschreven wijze zullen opnemen of uitvoeren in hun nationale rechtsorde.[14] Zo kunnen zij afspreken dat zij in een nationale wet een regeling (bijvoorbeeld een strafbaarstelling) zullen opnemen waarvan de inhoud in het verdrag meer of minder gedetailleerd is omschreven[15] of kunnen zij overeenkomen dat zij in hun nationale rechtsorde zullen toestaan dat particulieren een of meer bij of krachtens het verdrag vastgestelde regels in rechte kunnen inroepen.[16] Maar, zoals gezegd, schrijft het algemeen volkenrecht slechts voor dát, en niet hóé, een staat zijn internationaalrechtelijke verplichtingen moet nakomen.

Ten aanzien van de vraag hoe een staat zijn nationaal recht afstemt op zijn internationaalrechtelijke verplichtingen, zijn globaal gesproken twee tradities te onderscheiden. De traditie die het internationaal recht en het nationaal recht als complementair beschouwt, is de oudste. In deze traditie zijn de nationale rechter, andere overheidsorganen en particulieren (natuurlijke personen en rechtspersonen) zowel aan rechtsnormen van nationale als aan rechtsnormen van internationale origine gebonden. Deze normen vormen samen het recht dat door de overheid en door private personen in acht moet worden genomen.[17] Omdat een constitutioneel systeem dat op deze wijze is ingericht, geen (harde) scheiding maakt tussen de volkenrechtelijke en de 'eigen' rechtsorde, wordt het tegenwoordig wel 'monistisch' genoemd. Daarnaast is er een traditie ontstaan die door de staat gesloten verdragen weliswaar volkenrechtelijk verbindend acht, maar niet verbindend voor particulieren en de met toepassing van het recht belaste overheidsorganen (het bestuur en de rechter). Historisch gezien hangt de opkomst van deze traditie samen met het opkomend primaat van de nationale parlementen. Deze traditie is voortgekomen uit de opvatting dat een door de soeverein gesloten verdrag niet een door het parlement aangenomen wet (wet in formele zin, 'act of parliament', 'primary legis-

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[12] Zie hierna, par. 3.2.

[13] A. Cassese, *International Law*, tweede druk, Oxford: Oxford University Press 2005, p. 219-220; S.D. Murphy, 'Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?', in: D. Sloss (red.), *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study*, Cambridge: Cambridge University Press 2009, p. 61-119, i.h.b. p. 66-85; E. Denza, 'The Relationship between International and National Law', in: M.D. Evans (red.), *International Law*, derde druk, Oxford: Oxford University Press 2010, p. 411-412.

[14] Zie de fundamentele beschouwingen in R. Ago, 'Sixth report on State responsibility', *YILC* 1977, Vol. II, Part One, p. 4-8.

[15] Zie bijvoorbeeld artikel 4 van het Internationaal Verdrag inzake de uitbanning van alle vormen van rassendiscriminatie, dat in Nederland is uitgevoerd in de artikelen 137c e.v. van het Wetboek van Strafrecht.

[16] Zie bijvoorbeeld artikel 288, tweede lid, van het Verdrag betreffende de werking van de Europese Unie (voorheen art. 189 lid 2 EEG-Verdrag), waarin is bepaald dat verordeningen van de EU 'rechtstreeks toepasselijk' zijn in elke lidstaat.

[17] Althans voor zover deze normen hen aangaan. Veel normen van internationaal recht raken niet aan de rechten of verplichtingen van particulieren.

lation') opzij moet kunnen zetten.[18] Een constitutioneel systeem waarin het (geschreven) internationaal recht niet automatisch deel uitmaakt van het binnen deze staat geldende recht, wordt 'dualistisch' genoemd, omdat het een zekere scheiding aanbrengt tussen de volkenrechtelijke en de nationale rechtsorde.[19] Wanneer een staat met een dualistisch systeem gebonden is aan een norm van internationaal recht die een aanpassing van de nationale rechtsorde vergt, maar die niet zelf deel uitmaakt van deze rechtsorde, is er een wet of een andere rechtshandeling nodig die de inhoud van deze norm in de nationale rechtsorde verwerkt en verbindend maakt. De omzetting van de inhoud van een volkenrechtelijke norm in nationaal recht, wordt transformatie genoemd.

In de praktijk is het verschil tussen monistische en dualistische systemen minder groot dan in leerboeken vaak wordt gesuggereerd. De begrippen monisme en dualisme zijn twee schema's om de constitutionele stelsels te ordenen die staten hanteren om het internationaal recht te laten doorwerken in hun eigen rechtsorde, maar zeggen weinig over de methoden die een concrete, als monistisch of dualistisch geboekstaafde, staat gebruikt om in zijn eigen rechtsorde de tenuitvoerlegging van internationaalrechtelijke verplichtingen mogelijk te maken. Daarvoor is een nauwkeurig onderzoek van de constitutionele praktijk van elke staat afzonderlijk vereist. Pas daarna kunnen overeenkomsten en verschillen in kaart worden gebracht en worden geanalyseerd.

2.2 Het recht van de Europese Unie

Voordat we de doorwerking van het internationaal recht en in het bijzonder de status van het EVRM in de onderzochte landen in ogenschouw nemen, dient een opmerking over het recht van de Europese Unie (EU) te worden gemaakt. Het Hof van Justitie van de EU (HvJ EU) heeft handig (en radicaal) gebruik gemaakt van de hierboven gesignaleerde mogelijkheid dat twee of meer staten bij verdrag bepalen hoe de bij en krachtens dit verdrag vastgestelde rechtsnormen ten uitvoer worden gelegd in hun nationale rechtsorden. Volgens vaste jurisprudentie van het HvJ EU hebben de lidstaten van de Europese Gemeenschap (tegenwoordig de EU), anders dan bij gewone verdragen het geval is, bij de oprichtingsverdragen hun soevereiniteit – zij het op een beperkt terrein – begrensd door een nieuwe rechtsorde in het leven te roepen waarvan de rechtsnormen deel uitmaken van hun nationale rechtsorden en voorrang hebben op nationaal, inclusief constitutioneel, recht.[20] Als gevolg van deze jurisprudentie zijn de werking en de voorrang van het EU-recht in alle lidstaten gelijk, ongeacht of een lidstaat een dualistisch of een monistisch stelsel kent. In elke lidstaat zijn het nationaal recht en het recht van de EU complementair, waarbij het nationaal recht buiten toepassing blijft voor zover het in strijd is met EU-recht. Het constitutioneel recht van een lidstaat kan de rechtstreekse werking en voorrang van het EU-recht buiten kijf stellen – zoals in het Verenigd Koninkrijk is gebeurd door middel van de European Communities Act 1972 – maar vrij algemeen wordt aangenomen dat de werking van het EU-recht op nationaal vlak niet afhankelijk is van de wetgeving van de betrokken

[18] J.W.A. Fleuren, 'De historische ontwikkeling van de verhouding tussen internationaal en nationaal recht', *Ars Aequi* 61 (2012), p. 510-519. Overigens is tegenwoordig in veel staten de instemming van het parlement met belangrijke verdragen vereist, maar dit neemt niet weg dat het parlement de tekst van het verdrag niet kan amenderen ('slikken of stikken').

[19] De termen 'dualisme' en 'monisme' zien oorspronkelijk op de rechtstheoretische controverse over de vraag of het volkenrecht en het nationaal recht twee gescheiden rechtsorden zijn (dualisme) dan wel behoren tot een en dezelfde rechtsorde (monisme). Het gebruik van deze termen voor de aanduiding van constitutionele systemen met betrekking tot de doorwerking van internationaal recht in de nationale rechtsorde gaat terug op een voorstel van H.F. van Panhuys, 'Relations and Interactions between International and National Scenes of Law', *Recueil des cours de l'Académie de droit international de La Haye* (112) 1964-II, p. 14.

[20] HvJ EG 5 februari 1963, zaak 26/62, *Van Gend & Loos*, Jur. 1963, 1; HvJ EG 15 juli 1964, zaak 6/64, *Costa/ENEL*, Jur. 1964, 1199; HvJ EG 17 december 1970, zaak 11/70, *Internationale Handelsgesellschaft*, Jur. 1970, 1125; HvJ EG 9 maart 1978, zaak 106/77, *Simmenthal II*, Jur. 1978, 629; HvJ EG 22 oktober 1998, gev. zaken C-10/97 t/m C-22/97, *IN. CO. GE '90*, Jur. 1998, I-6307.

lidstaat. Dit is slechts anders voor zover het EU-recht zelf een optreden van de nationale regelgevers vergt om zijn volle werking te ontplooien.[21]

Enkele constitutionele hoven blijken moeite te hebben met de aanvaarding van de volle consequenties van deze jurisprudentie van het Hof van Justitie.[22] In de praktijk wordt de rechtstreekse werking en de voorrang van het EU-recht echter in vrijwel alle gevallen aanvaard en betreft het verzet uitzonderlijke situaties, zoals die waarin de EU volgens een nationale constituitonele rechter duidelijk *ultra vires* heeft gehandeld.

Om deze reden is de doorwerking van het EU-recht in België, Duitsland, Frankrijk, Nederland, het Verenigd Koninkrijk en Zweden in deze studie niet afzonderlijk onderzocht. Deze studie beperkt zich tot de wijzen waarop de doorwerking van 'gewoon' internationaal recht, dus internationaal recht dat niet behoort tot het primair of secundair EU-recht, in deze landen gestalte krijgt.

2.3 De status van het internationaal recht, in het bijzonder het EVRM, in de onderzochte landen

2.3.1 Te onderscheiden vragen

Bij het onderzoek naar de plaats van het internationaal recht, in het bijzonder het EVRM, in België, Duitsland, Frankrijk, Nederland, het Verenigd Koninkrijk en Zweden, zijn de volgende vragen onderscheiden:

1. Hoe bewerkstelligt het nationale constitutionele recht dat internationaalrechtelijke verplichtingen die aan de nationale rechtsorde raken, in deze rechtsorde worden opgenomen of verwerkt?

2. Welke rang neemt het internationaal recht dan wel in nationaal recht omgezet internationaal recht in in de normenhiërarchie?

3. In hoeverre is de nationale rechter bevoegd internationaal recht toe te passen en nationaal recht aan internationaal recht te toetsen?

Deze vragen zijn voorgelegd aan de landenrapporteurs, die ze voor hun eigen constitutionele orde zowel in het algemeen als voor het EVRM hebben beantwoord. De hierop betrekking hebbende vragen zijn terug te vinden in de delen 1 en 2 van de questionnaire voor de landenrapporten (zie de bijlage bij deze eindrapportage). In het hiernavolgende geven wij de hoofdlijnen weer van de antwoorden die op deze vragen zijn gegeven. Voor meer detail zij de lezer verwezen naar de verschillende landenrapporten, die als bijlagen bij dit rapport zijn opgenomen. Allereerst gaan wij in op de verschillende wijzen waarop normen van internationaal recht onderdeel vormen van, of worden verwerkt in, het geldende recht binnen de staat (par. 2.3.2). Daarbij besteden wij in het bijzonder aandacht aan noties van monisme en dualisme en aan de betekenis daarvan voor de status van het EVRM in de nationale rechtsorde. Vervolgens is par. 2.3.3 gewijd aan het vraagstuk van de rechtstreekse werking van bepalingen van internationaal recht. In dat verband komt onder meer de relatie aan de orde tussen de rechtstreekse werking van de materiële bepalingen van EVRM, de grenzen van de rechtsvormende taak van de rechter en de vraag of deze bevoegd is om een bevel tot wetgeving te geven. In het kader van de toepassing van het EVRM door de nationale rechter staan wij ook kort stil

[21] Zie artikel 288, derde lid, VwEU.

[22] De studie van M. Claes, *The National Courts' Mandate in the European Constitution*, Oxford: Hart 2006, plaatst dit verzet in constitutioneel-historisch en theoretisch perspectief.

bij de horizontale werking van EVRM-bepalingen. Vervolgens gaat par. 2.3.4 over de rang van het internationaal recht, in het bijzonder het EVRM, in de nationale rechtsorde en de vraag in hoeverre met deze rangorde een toetsingsbevoegdheid van de rechter correspondeert. Ten slotte staan we stil bij de methode van verdragsconforme uitleg en toepassing van nationaal recht en de manier waarop de constitutionele hoven in België, Duitsland en Frankrijk deze methode combineren met hun bevoegdheid tot constitutionele toetsing (par. 2.3.5).

2.3.2 De opname van (de inhoud van) internationale rechtsnormen in de nationale rechtsorde

Een eerste vraag die opkomt is welke normen van internationaal recht in het nationale constitutionele recht als 'part of the law of the land', dus als onderdeel van het geldende recht, worden gezien. Deze vraag wordt hierna op basis van de landenrapporten beantwoord voor drie hoofdcategorieën van internationale normen: internationaal gewoonterecht, verdragen en besluiten van volkenrechtelijke organisaties. Waar het gaat om de status van verdragen, zal ook aandacht worden besteed aan de positie van het EVRM. Vervolgens wordt getracht een verklaring te vinden voor de verschillen in doorwerkingsregimes tussen de onderscheiden nationale rechtsordes.

Internationaal gewoonterecht
In vijf van de zes onderzochte landen, waaronder Nederland, staat buiten kijf dat het internationaal gewoonterecht in beginsel deel uitmaakt van het binnen de staat geldende recht (het is 'part of the law of the land'). Wat betreft het Verenigd Koninkrijk past daarbij wel de kanttekening dat in recente rechtspraak verplichtingen die uit het internationaal gewoonterecht voortvloeien, slechts tot 'the law of the land' gerekend worden voor zover zij duidelijk vastgesteld en door de rechter binnen zijn rechtsprekende taak toegepast kunnen worden. In Duitsland is de status van het internationaal gewoonterecht uitdrukkelijk in de grondwet vastgelegd. Uit artikel 25 van het *Grundgesetz* volgt dat de algemene regels van het volkenrecht deel uitmaken van het bondsrecht, dat zij voorgaan op zowel de bondswetten als de wetten van de *Länder* en dat zij direct rechten en plichten voor particulieren in het leven roepen.

Ook in landen waar het dualisme wortel heeft geschoten – zoals het Verenigd Koninkrijk en Duitsland – is ten aanzien van het internationaal gewoonterecht de oude traditie dat het internationaal en nationaal recht complementair zijn, dus veelal voortgezet.[23] Alleen in het sterk dualistische Zweden staat ter discussie of het internationaal gewoonterecht 'part of the law of the land' is, zij het dat er enkele rechterlijke uitspraken bestaan die in de richting van een bevestigend antwoord zouden kunnen wijzen.[24]

Verdragen
Wat betreft verdragen vallen de onderzochte landen in twee groepen uiteen. Enerzijds zijn er de staten België, Duitsland, Frankrijk en Nederland, waar verdragen deel uitmaken van het binnen de staat geldende recht. Anderzijds zijn er het Verenigd Koninkrijk en Zweden, waar de rechter niet bevoegd is om verdragen toe te passen die bindend zijn voor de staat.[25] In het Verenigd Koninkrijk en Zweden kan de nationale rechtsorde slechts in overeenstemming met een verdrag worden gebracht door de inhoud van het verdrag te verwerken in een nationale regeling of door in een nationale regeling uitdrukkelijk vast te leggen welke bepalingen van het verdrag kracht van wet hebben.[26]

[23] M.P. Van Alstine, 'The Role of Domestic Courts in Treaty Enforcement. Summary and Conclusions', in: Sloss 2009, reeds aangehaald, noot 13, p. 581-582.
[24] Zie de antwoorden op vraag 3.a van de questionnaire.
[25] Zie de antwoorden op vraag 3 van de questionnaire.
[26] Zie met betrekking tot het Verenigd Koninkrijk het overzicht van 'Routes to Incorporation' in S. Fatima, *Using International Law in Domestic Courts*, Oxford: Hart 2005, p. 56-65.

België, Duitsland, Frankrijk en Nederland behoren tot de landen waar verdragen, mits er aan bepaalde voorwaarden is voldaan, deel uitmaken van het binnen de staat geldende recht en door de nationale rechter als bron van internationaal recht kunnen worden toegepast.[27] Veelal zijn deze voorwaarden dat het verdrag niet alleen volkenrechtelijk bindend is voor de staat, maar ook overeenkomstig de grondwet door het parlement is goedgekeurd en is bekendgemaakt.

In het Koninkrijk der Nederlanden maken verdragen automatisch deel uit van het binnen het Koninkrijk – althans het deel van het Koninkrijk waarop het verdrag van toepassing is – geldende recht zodra het verdrag verbindend is geworden voor het Koninkrijk. Hiervoor is niet vereist dat het verdrag de goedkeuring van de Staten-Generaal heeft gekregen, noch dat het is bekend gemaakt. De Grondwet stelt alleen de bekendmaking als een noodzakelijke voorwaarde waaraan voldaan moet zijn om de bepalingen van een verdrag een ieder verbindend te laten zijn en voor te laten gaan op wettelijke voorschriften (art. 93 en 94 Gw).

Het wekt op het eerste gezicht misschien verbazing dat Duitsland bij de tweede groep van staten is ingedeeld. Het Duitse systeem van doorwerking van internationaal recht in de nationale rechtsorde heet immers dualistisch te zijn. Dat is in zoverre juist dat de rechtsleer in Duitsland ervan uitgaat dat er een rechtshandeling of bevel van de staat nodig is om de Duitse rechter bevoegd te maken om de inhoud van internationale rechtsnormen toe te passen. Waar het gaat om internationaal gewoonterecht wordt deze rechtshandeling gelezen in artikel 25 van het *Grundgesetz* en waar het gaat om verdragen die de instemming van de Bondsdag behoeven,[28] wordt deze rechtshandeling gelezen in de wet waarbij deze instemming is verleend. In het verleden werd in artikel 25 van het *Grundgesetz* en in de toestemmingswet (goedkeuringswet) een rechtshandeling gezien die de algemene regels van het volkenrecht in hun geheel, en ieder goedgekeurd verdrag afzonderlijk, transformeerde in nationaal, Duits recht. In deze gedachtegang ontstaat er naast de internationale rechtsnorm die bindend is voor de Bondsrepubliek Duitsland in haar betrekkingen tot andere subjecten van volkenrecht, een parallelle, inhoudelijk identieke rechtsnorm die bindend is in de interne rechtsorde. Deze *Transformationslehre* heeft tegenwoordig plaatsgemaakt voor de leer dat artikel 25 van het *Grundgesetz* en de instemmingswet geen omzetting in nationaal, Duits recht bewerkstelligen, maar slechts een bevel aan de Duitse rechter zijn om het internationaal gewoonterecht dan wel het verdrag *als zodanig*, dus als norm van internationaal recht, toe te passen. Deze *Vollzugslehre* (ook wel *Theorie des Anwendungsbefehls* genoemd) is thans de heersende, door het Bundesverfassungsgericht onderschreven leer, aangezien zij een eenvoudigere verklaring van het positief recht biedt dan de transformatieleer.[29] Omdat ook deze theorie, gelet op de eis van een toepassingsbevel, vasthoudt aan een scheiding tussen de volkenrechtelijke en de nationale rechtsorde, kan het constitutionele systeem in Duitsland nog steeds als, zij het gematigd, dualistisch worden aangemerkt.[30] Uit deze kwalificatie moet echter niet de verkeerde conclusie worden getrokken dat de Duitse rechter de inhoud van algemene regels van het volkenrecht en van verdragen pas kan toepassen nadat deze is omgezet in nationaal recht.

Voor de positie van het EVRM in de nationale rechtsorde heeft dit verschil in benadering evident betekenis. Voor de sterk dualistische staten (Verenigd Koninkrijk en Zweden) geldt dat zij weliswaar behoren tot de eerste landen waarvoor het EVRM in werking is getreden (op 3 september 1953), maar dat het lang heeft geduurd voordat particulieren een beroep konden doen op de in het EVRM vervatte rechten en vrijheden. Voordien kon de rechter alleen indirect met het EVRM rekening houden door nationaal recht zo mogelijk uit te leggen en toe te passen op een wijze die een schending

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[27] Zie de antwoorden op vraag 3 van de questionnaire.
[28] Zie art. 59(2) Grundgesetz für die Bundesrepublik Deutschland.
[29] Zie het antwoord op vraag 3.a in het Duitse landenrapport.
[30] Zie het antwoord op vraag 3.e in het Duitse landenrapport.

van het EVRM voorkwam. Pas met ingang van 1 januari 1995 heeft Zweden het EVRM en de protocollen waar het partij bij is, bij gewone wet – waaraan als bijlage de tekst en een vertaling van het EVRM en deze protocollen zijn toegevoegd – tot een nationale wet verklaard.[31] In het Verenigd Koninkrijk is op 2 oktober 2000 de Human Rights Act 1998 (HRA) in werking getreden, die de Britse rechter en andere overheidsorganen bevoegd maakt de daarin opgesomde – en in een bijlage opgenomen – artikelen van het EVRM en van enkele protocollen toe te passen met inachtneming van de relevante rechtspraak van het EHRM. Bovendien bevat de Human Rights Act 1998 een verplichting om primaire en lagere wetgeving zoveel als mogelijk is uit te leggen en toe te passen op een wijze die verenigbaar is met deze artikelen.

In de tweede groep van landen die hiervóór is onderscheiden (dus in België, Duitsland, Frankrijk, en Nederland) maakt het EVRM, samen met de protocollen waarbij het desbetreffende land partij is, deel uit van het binnen de staat geldende recht.

Besluiten van volkenrechtelijke organisaties

In Duitsland maken besluiten van volkenrechtelijke organisaties die bindend zijn voor de staat, geen deel uit van het binnen de staat geldende recht, tenzij er een rechtshandeling van de staat kan worden aangewezen die het betrokken besluit deze status heeft verleend. Dit is anders in België, Frankrijk en Nederland, waar het monistisch stelsel onder meer betekent dat besluiten van volkenrechtelijke organisaties die in het internationale vlak verbindend zijn, automatisch deel uitmaken van het binnen de staat geldende recht, zij het dat eventueel bekendmaking vereist is. Naar Nederlands constitutioneel recht kunnen besluiten van volkenrechtelijke organisaties die bindend zijn voor het Koninkrijk, geen een ieder verbindende kracht en geen voorrang hebben op wettelijke voorschriften als zij niet eerst zijn bekendgemaakt (art. 93 en 94 Gw). In de in dit onderzoek betrokken landen zijn besluiten van volkenrechtelijke organisaties die niet bindend zijn voor de staat (bijvoorbeeld omdat zij het karakter van een aanbeveling of advies hebben of weliswaar bindend zijn, maar niet voor de staat in kwestie), *a fortiori* geen 'part of the law of the land', maar worden zij niettemin veelvuldig door de nationale rechter betrokken bij de uitleg en toepassing van nationaal recht.[32]

Historische verklaring

Of een land een als monistisch of een als dualistisch te kwalificeren stelsel van doorwerking van internationaal recht kent, moet vooral historisch verklaard worden. België, Frankrijk en Nederland zijn altijd blijven staan in de traditie waarin het internationaal en het nationaal recht complementair zijn.[33] In Engeland heeft de Glorious Revolution van 1688 een einde gemaakt aan het prerogatief van de Kroon om door middel van het sluiten van verdragen wetgevende bevoegdheid uit te oefenen en zodoende bestaande wetten zonder medewerking van het parlement te doorkruisen.[34] Tot op de dag van vandaag ligt het beginsel van 'sovereignty of Parliament' ten grondslag aan het dualistische stelsel van het Verenigd Koninkrijk.[35] In Zweden moet het dualisme begrepen worden tegen de achtergrond van 1) de constitutionele scheiding tussen het parlement en de regering enerzijds en de rechter anderzijds, en 2) de nadruk die in Zweden ligt op rechtszekerheid en coherentie van het recht. In de Zweedse grondwet is het dualisme echter slechts impliciet aanwezig; het is in wezen een – betrekkelijk recente – creatie van de rechtspraak.[36] In Duitsland is de (gematigd) dualistische interpre-

[31] Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna. Zie ook I. Cameron, 'Sweden', in: R. Blackburn & J. Polakiewicz (red.), *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States, 1950-2000*, Oxford: Oxford University Press 2001, p. 838.
[32] Zie de antwoorden op vraag 3.a van de questionnaire.
[33] Vgl. Fleuren 2012, reeds aangehaald, noot 18.
[34] W. Holdsworth, *A History of English Law*, Vol. XIV (edited by A.L. Goodhart & H.G. Hanbury), London: Sweet & Maxwell 1982, p. 67 e.v.
[35] Zie het antwoord op vraag 3.a in het landenrapport over het Verenigd Koninkrijk.
[36] Zie het antwoord op vraag 3.a in het Zweedse landenrapport.

tatie van het constitutioneel recht een erfenis van de in het laatste kwart van de 19e eeuw door enkele Duitse rechtsgeleerden ontwikkelde theorie dat het volkenrecht en het nationaal recht in die zin twee gescheiden rechtsorden zijn dat zij niet dezelfde rechtsbetrekkingen *kunnen* reguleren – het internationaal recht normeert relaties tussen staten, terwijl het nationaal recht betrekkingen tussen particulieren onderling en tussen particulieren en de staat regelt – en dus ook niet complementair *kunnen* zijn.[37] Hoewel het dualisme in deze scherpe vorm geen aanhang meer vindt, heeft de theorie haar sporen in de Duitse rechtsleer nagelaten. De oorspronkelijke achtergrond van de theorie – de strijd om de bevoegdheidsafbakening tussen het parlement en de uitvoerende macht[38] – is daarbij buiten beeld geraakt.

2.3.3 Het vraagstuk van de rechtstreekse werking

Het begrip rechtstreekse werking
Voor zover internationaal gewoonterecht, verdragen en besluiten van volkenrechtelijke organisaties deel uitmaken van het binnen de staat geldende recht, zijn regelstellende organen, de met toepassing van het recht belaste ambten (bestuursorganen en de rechter) en particulieren (natuurlijke en rechtspersonen) aan deze normen van internationaal recht gebonden. Dit is een efficiënte manier om de naleving, de tenuitvoerlegging en de toepassing van het internationaal recht binnen de nationale rechtsorde te bevorderen, zeker voor zover het internationaal recht bovendien voorrang heeft op het nationaal recht. Een dergelijk stelsel laat onverlet dat de volledige uitvoering van de internationaalrechtelijke verplichtingen van de staat veelvuldig een optreden van de wetgever vergt. Het kan bijvoorbeeld zijn dat een verdrag het bestaan van bepaalde wettelijke voorzieningen veronderstelt, die in sommige staten nog gecreëerd moeten worden. Maar het kan ook zijn dat een verdrag – of een besluit van een volkenrechtelijke organisatie – bepalingen bevat die een voorziening voorschrijven, die slechts door de wetgever in het leven kan worden geroepen.

Dit brengt ons bij het onderscheid tussen bepalingen die rechtstreekse werking ('direct effect') hebben – in de rechtsleer wordt ook wel gesproken van bepalingen die 'self-executing' of 'direct toepasbaar' zijn – en bepalingen die geen rechtstreekse werking hebben. Het onderscheid ziet oorspronkelijk op het verschil tussen enerzijds verdragsbepalingen die zelf een regeling (althans een voldoende uitgewerkte rechtsnorm) bevatten die – tenminste in staten waar verdragen deel uitmaken van het binnen de staat geldende recht – door het bestuur of de rechter kan worden uitgevoerd dan wel toegepast,[39] en anderzijds verdragsbepalingen die in de nationale rechtsorde slechts kunnen worden geïmplementeerd door algemeen verbindende voorschriften vast te stellen waarvan de inhoud in de bepaling meer of minder globaal wordt omschreven.[40] In elk van de onderzochte landen waar verdragen – eventueel na parlementaire goedkeuring en bekendmaking – deel uitmaken van het binnen de staat geldende recht, dus België, Duitsland, Frankrijk en Nederland, speelt het onderscheid tussen rechtstreeks werkende en niet rechtstreeks werkende verdragsbepalingen een rol. Het onderscheid wordt echter niet altijd en overal op dezelfde manier ingevuld. Bovendien zijn er rechters die het antwoord op de vraag in hoeverre verdragsbepalingen rechtstreekse werking hebben, uitsluitend laten afhangen van de inhoud van die bepalingen, terwijl andere rechters daarnaast de context van belang achten waarin er een beroep op de bepaling wordt gedaan. In de rechtspraak van de Nederlandse rechter overheerst tot nu toe de eerstgenoemde benadering,[41] maar onder invloed

[37] Zie vooral H. Triepel, *Völkerrecht und Landesrecht*, Leipzig: Hirschfeld 1899.
[38] De constitutioneel-historische achtergrond van het ontstaan van het dualisme als theorie in het laatste kwart van de 19e eeuw wordt geanalyseerd in T. Öhlinger, *Der völkerrechtliche Vertrag im staatlichen Recht. Eine theoretische, dogmatische und vergleichende Untersuchung am Beispiel Österreichs*, Wien: Springer 1973, hoofdstuk II.
[39] Schoolvoorbeelden zijn te vinden in verdragen op het gebied van het internationaal privaatrecht.
[40] Enkele voorbeelden: art. 9 Internationaal Verdrag inzake economische, sociale en culturele rechten; art. 4 Internationaal Verdrag inzake de uitbanning van alle vormen van rassendiscriminatie; art. 13 lid 1 Europees Sociaal Handvest (herzien).
[41] Zie het antwoord op vraag 4 in het Nederlandse landenrapport.

van de jurisprudentie van het HvJ EU over de rechtstreekse werking van bepalingen van EU-recht[42] schiet ook de tweede benadering wortel.[43] In deze zogenoemde 'relatieve benadering' is het bijvoorbeeld mogelijk dat een verdragsbepaling die in duidelijke bewoordingen verplicht tot de vaststelling van een nationale regeling, niettemin in zoverre rechtstreekse werking heeft dat de rechter kan toetsen of de wetgever binnen de hem door de bepaling gelaten discretionaire ruimte is gebleven.[44] In de rechtspraak van de Belgische rechter overheerst een dergelijke relatieve benadering van de vraag of een ingeroepen verdragsbepaling in het voorliggende geval rechtstreekse werking heeft.[45] In de Duitse rechtsliteratuur is de leer gangbaar dat uitsluitend de rechtstreeks werkende (d.w.z. direct toepasbare) bepalingen van een verdrag dat bij wet door de bondsdag is goedgekeurd, deel uitmaken van het binnen Duitsland geldende recht.[46] Deze leer is echter niet onomstreden.[47]

Van de genoemde landen is Nederland het enige waar het begrip rechtstreekse werking in de Grondwet is geïncorporeerd. Uit de grondwetsgeschiedenis blijkt dat met bepalingen die naar hun inhoud een ieder kunnen verbinden in de zin van art. 93 Gw, bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties worden bedoeld die self-executing zijn ofwel rechtstreekse werking hebben. Door de reikwijdte van de art. 93 en 94 Gw te beperken tot rechtstreeks werkende bepalingen heeft men enerzijds willen zekerstellen dat alleen dergelijke bepalingen verbindende kracht jegens particulieren hebben en anderzijds willen voorkomen dat de rechter zich genoodzaakt kan zien om een wettelijk voorschrift wegens strijd met verdragsrecht buiten toepassing te laten zonder dat aan dit verdragsrecht een regel kan worden ontleend die de leemte opvult die anders door deze buitentoepassinglating zou kunnen ontstaan.[48]

De rechtstreekse werking van het EVRM

Uit de wordingsgeschiedenis van het EVRM blijkt dat bij de opstellers de bedoeling heeft voorgezeten dat de materiële bepalingen van dit verdrag rechtstreekse werking hebben in staten waar het verdrag behoort tot het binnen de staat geldende recht.[49] In overeenstemming hiermee pleegt de rechter in België, Duitsland, Frankrijk en Nederland rechtstreekse werking toe te kennen aan alle materiele bepalingen van het EVRM en de protocollen waarbij de staat in kwestie partij is.[50] In Nederland heeft de Hoge Raad in het verleden een ieder verbindende kracht ontzegd aan de bepaling over het recht op een 'effective remedy' voor een nationale instantie in het geval iemand het slachtoffer is van een schending van het EVRM (art. 13 EVRM), maar deze rechtspraak is achterhaald. In Zweden zijn het EVRM en de betrokken protocollen tot nationale wet verklaard en lijkt de kwestie van rechtstreekse werking geen rol te spelen. Iets vergelijkbaars geldt voor het Verenigd Koninkrijk, waar de

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[42] Zie voor de wijze waarop het Hof van Justitie omgaat met het vraagstuk van de rechtstreekse werking van bepalingen van EU-recht S. Prechal, 'Does Direct Effect Still Matter?', *Common Market Law Review* 37 (2000), p. 1047-1069; J.W.A. Fleuren & M.L.W.M. Viering, 'Rechtstreekse werking en een ieder verbindende kracht: Europese inspiratie voor de nationale rechter?', in: P.P.T. Bovend'Eert, J.W.A. Fleuren & H.R.B.M. Kummeling (red.), *Grensverleggend staatsrecht. Opstellen aangeboden aan prof. mr. C.A.J.M. Kortmann*, Deventer: Kluwer 2001, p. 101-138; J.M. Prinssen, *Doorwerking van Europees recht* (diss. Amsterdam UvA), Deventer: Kluwer 2004.

[43] Recente voorbeelden zijn ABRvS 7 februari 2012, *LJN* BV3716; Hof Den Haag 26 maart 2013, *LJN* BZ4871 (Rookverbod). In het verleden hebben sommige bestuursrechters wel geëxperimenteerd met een relatieve benadering van de vraag of een verdragsbepaling rechtstreekse werking heeft (Fleuren 2004, reeds aangehaald, noot 3, p. 410-418).

[44] Hof Den Haag 26 maart 2013, *LJN* BZ4871 (Rookverbod).

[45] Zie het antwoord op vraag 6b van het Belgische landenrapport.

[46] Zie de antwoorden op de vragen 3a en 3c van het Duitse landenrapport.

[47] R. Geiger, Grundgesetz und Völkerrecht, mit Europarecht. Die Bezüge des Staatsrechts zum Völkerrecht und Europarecht, 5. Auflage, München: Beck 2010, p. 157-158.

[48] *Kamerstukken II* 1955/56, 4133 (R 19), nr. 4. Zie ook Fleuren 2004, reeds aangehaald, noot 3, p. 201-215.

[49] Dit blijkt met name uit de wordingsgeschiedenis van artikel 1 EVRM. Zie Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, 8 vols., 's-Gravenhage: Nijhoff 1975-1985, Vol. V, p. 26-27, 34-35, 66-67, 74-75.

[50] Zie de antwoorden op vraag 6.a van de questionnaire.

Human Rights Act 1998 uitdrukkelijk de materiële bepalingen opsomt waar de rechter en andere 'public authorities' aan gebonden zijn.[51]

De rechtstreekse werking van de materiële bepalingen van het EVRM en de relevante protocollen in België, Duitsland, Frankrijk en Nederland, dan wel de incorporatie van de betrokken bepalingen in het Verenigd Koninkrijk en Zweden, heeft tot gevolg dat particulieren in beginsel jegens de overheid een aanspraak hebben op naleving van deze bepalingen. De materiële bepalingen van het EVRM en de protocollen zijn een bron van subjectieve rechten in de nationale rechtsorde.[52] De bevoegdheid en taak van de nationale rechter kunnen echter grenzen stellen aan zijn vermogen of bereidheid om schendingen van het EVRM te voorkomen. Zo is de Britse rechter niet bevoegd om een bij of ingevolge primaire wetgeving vastgesteld voorschrift onverbindend te verklaren of buiten toepassing te laten wegens strijd met de krachtens de Human Rights Act 1998 in de rechtsorde van het Verenigd Koninkrijk geïncorporeerde bepalingen van het EVRM en de protocollen. De vraag in hoeverre de nationale rechter wettelijke voorschriften mag toetsen aan internationaal recht, in het bijzonder aan het EVRM, komt aan de orde in par. 2.3.4.

Op deze plaats dient de aandacht gevestigd te worden op een ander probleem, dat zich met name in de jurisprudentie van de Belgische en Nederlandse rechter blijkt te manifesteren. Zoals bekend leggen de materiële bepalingen van het EVRM aan de verdragsstaten niet alleen de verplichting op om zich te onthouden van een ongeoorloofde inmenging in de rechten en vrijheden die in deze bepalingen zijn omschreven. Het EHRM leidt uit het EVRM ook positieve verplichtingen voor de verdragsstaten af teneinde een effectieve uitoefening van deze rechten en vrijheden te verzekeren.[53] Voor zover deze positieve verplichtingen nog niet in het nationaal recht zijn verwezenlijkt, vergen zij een actief optreden van de staat in de vorm van het treffen van maatregelen. In België heeft dit het Hof van Cassatie ertoe gebracht om aan de materiële bepalingen van het EVRM rechtstreekse werking toe te kennen voor zover zij onthoudingsverplichtingen voor de staat impliceren en rechtstreekse werking te ontzeggen voor zover zij de staat verplichten tot maatregelen die beleidskeuzen vergen die op de weg van de wetgever liggen. Daarentegen is voor het Grondwettelijk Hof in België de vraag naar de rechtstreekse werking van verdragsbepalingen niet van belang, aangezien het slechts beoordeelt of de wetgever de in de grondwet vervatte rechten en vrijheden, die het waar nodig interpreteert in het licht van internationale verplichtingen, heeft geschonden.[54]

Grenzen van de rechtsvormende taak van de rechter

In Nederland zijn de materiële bepalingen van het EVRM weliswaar een ieder verbindend in de zin van de art. 93 en 94 Gw, maar loopt de rechter niettemin soms aan tegen de grenzen van zijn rechtsvormende taak. Wanneer een discrepantie tussen het Nederlands recht en het EVRM, zoals uitgelegd door het EHRM, op verschillende wijzen kan worden weggewerkt, terwijl geen van deze opties aansluit bij de geschiedenis en het stelsel van de bestaande wet, is het volgens vaste jurisprudentie van de Hoge Raad in beginsel aan de wetgever en niet aan de rechter om de hiermee gemoeide rechtspolitieke keuze te maken, zeker als de rechter de gevolgen van een keuze moeilijk kan overzien. De rechter is beducht om de wetgever voor de voeten te lopen. Dit kan zelfs betekenen dat de rechter in weerwil van art. 94 Gw een wet die in strijd komt met een verdragsbepaling die een ieder verbindt, niettemin toepast.[55] In zijn in 2000 gehouden afscheidsrede als president van de Hoge Raad heeft

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[51] Zie de antwoorden op vraag 6.a van de questionnaire. Overigens behoort art. 13 EVRM niet tot de bepalingen die in de Human Rights Act 1998 worden opgesomd.

[52] Zie de antwoorden op vraag 6.b van de questionnaire.

[53] Zie over het leerstuk van positieve verplichtingen J.H. Gerards, *EVRM – Algemene beginselen*, Den Haag: Sdu 2011, hoofdstuk 4.

[54] Zie het antwoord op vraag 6.b in het Belgische landenrapport.

[55] Vergelijk voor een zeldzaam geval HR 23 september 1988, *NJ* 1989, 740 (Naamrecht), waarin het toenmalige art. 1:5 van het Burgerlijk Wetboek niet buiten toepassing werd gelaten, hoewel toepassing in het voorliggende geval naar het oordeel

Martens betoogd dat deze jurisprudentie niet zozeer verband houdt met het feit dat de rechter in Nederland niet democratisch is gelegitimeerd – de rechter ontleent volgens Martens zijn legitimatie aan de 'rule of law', dus aan het gegeven dat Nederland een rechtstaat is – als wel met het primaat van de wetgever en in het bijzonder het toetsingsverbod van artikel 120 Gw.[56] De Hoge Raad beschouwt dit toetsingsverbod – zolang het gehandhaafd blijft – als wezenlijk voor 'de traditionele plaats' van de rechter in het Nederlands staatsbestel.[57] Wanneer de wetgever er overigens door de rechter op is gewezen dat het op zijn weg ligt om het nationaal recht op een bepaald punt in overeenstemming te brengen met het EVRM, maar deze almaar blijft stilzitten, is niet uitgesloten dat de rechter in latere rechtspraak alsnog zelf deze discrepantie wegneemt. De bevoegdheid daartoe ontleent de rechter aan de artikelen 93 en 94 Gw.[58] Bij betrekkelijk geringe inbreuken op het EVRM lijkt het EHRM genoegen te nemen met deze opstelling van de Hoge Raad;[59] bij andersoortige inbreuken is dit niet bekend.

In Duitsland, Frankrijk, het Verenigd Koninkrijk en Zweden lijkt het probleem dat de nationale rechter een beroep op het EVRM uitdrukkelijk van de hand wijst omdat honorering rechtspolitieke keuzen vergt die niet op zijn weg liggen, zich niet of minder in de rechtspraak te manifesteren.[60] Wat het Verenigd Koninkrijk betreft past daarbij de kanttekening dat de hogere rechters weliswaar het oordeel kunnen uitspreken dat wetgeving onverenigbaar is met de in de Human Rights Act 1998 opgesomde bepalingen van het EVRM, maar dat het vervolgens aan de uitvoerende en wetgevende macht is om te beslissingen of en welke wijzigingen er in deze wetgeving worden aangebracht.[61] Voor zover met het opheffen van de onverenigbaarheid beleidskeuzen gemoeid zijn, komen deze dus vanzelf op het bord van de politieke organen te liggen.

Bevel tot wetgeving

Het probleem dat met het wegnemen van discrepanties tussen het nationaal recht en een norm van internationaal recht, in het bijzonder het EVRM, afwegingen van rechtspolitieke aard gemoeid kunnen zijn die de rechter wil of moet overlaten aan de wetgever, roept de vraag op of hij bevoegd is de (formele) wetgever of de staat te bevelen om een wet of wetswijziging tot stand te brengen die deze discrepantie wegneemt en of het voor het antwoord verschil maakt of deze norm is vervat in een rechtstreeks werkende bepaling. In Frankrijk, Nederland, het Verenigd Koninkrijk en Zweden heeft de rechter deze bevoegdheid niet. Hetzelfde geldt voor de gewone rechter in België en Duitsland. Het Duitse *Bundesverfassungsgericht* kan de bondsdag echter verplichten om een wet vast te stellen teneinde een ongrondwettige situatie op te heffen. En in België heeft het oordeel van het Grondwettelijk Hof dat de wet een leemte vertoont die in strijd is met de grondwet, tot gevolg dat de wetgever deze leemte moet opvullen. Omdat beide constitutionele hoven de in de grondwet vervatte rechten en vrijheden mede in het licht van het EVRM uitleggen, kan deze verplichting tot wetgeving dus indirect uit dit verdrag voortvloeien.[62]

Rechtstreekse werking en horizontale werking

Wanneer een verdragsbepaling rechtstreekse werking heeft, hangt het van de inhoud van de in deze bepaling vervatte regeling of rechtsnorm af in welke rechtsverhoudingen zij kan worden toegepast. Enkele voorbeelden kunnen dit illustreren. Een rechtstreeks werkende verdragsbepaling die de staat

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van de Hoge Raad in strijd kwam met het in artikel 26 Internationaal Verdrag inzake burger- en politieke rechten vervatte gelijkheidsbeginsel.

[56] S.K. Martens, 'De grenzen van de rechtsvormende taak van de rechter', *Nederlands Juristenblad* 75 (2000), p. 751.

[57] HR 14 april 1989, *NJ* 1989, 469 (Harmonisatiewet).

[58] HR 12 mei 1999, *BNB* 1999/271 (Arbeidskostenforfait); Martens 2000, reeds aangehaald, noot 56, p. 750-751.

[59] EHRM 29 januari 2002, appl. no. 45600/99 (Auerbach).

[60] Vergelijk de antwoorden in de landenrapporten op vraag 6b.

[61] Zie het antwoord op vraag 8 in het landenrapport over het Verenigd Koninkrijk.

[62] Zie de antwoorden op de vragen 6.c en 9 van de questionnaire.

verplicht tot uitlevering van personen die in een ander land van een nader omschreven misdrijf worden beschuldigd, kan door vervolgende en rechterlijke instanties aan deze personen worden tegengeworpen. Omgekeerd zullen internationaal opererende personen en ondernemingen de rechtstreeks werkende bepalingen van verdragen ter vermijding van dubbele belastingen kunnen tegenwerpen aan de fiscus en de belastingrechter. En rechtstreeks werkende bepalingen van verdragen op het terrein van het internationaal privaatrecht en het eenvormig privaatrecht vinden toepassing op geschillen tussen particulieren onderling.

Aangezien mensenrechtenverdragen aan de verdragsstaten de plicht opleggen de daarin vervatte rechten en vrijheden van burgers te respecteren en te erkennen, zullen zij – voor zover zij rechtstreekse werking hebben – door natuurlijke en rechtspersonen tegen de overheid kunnen worden ingeroepen. De praktijk laat echter zien dat de nationale rechter dergelijke verdragen ook wel als argument hanteert in zijn beoordeling van geschillen tussen private partijen. Bij het EVRM gebeurt dit in de onderzochte landen met regelmaat (zij het dat de Zweedse rechter in het algemeen spaarzamer is met de toepassing van het EVRM).[63] Op het eerste gezicht kan dit verbazing wekken, temeer omdat burgers bij het EHRM alleen kunnen klagen over schendingen van het EVRM door een verdragsstaat en niet over schendingen door een particulier.[64] Bedacht moet echter worden dat verdragen op het gebied van mensenrechten bepalingen kunnen bevatten die aan de staat een zekere (positieve) verplichting opleggen om ervoor te zorgen dat burgers de erin vervatte rechten ook jegens hun medeburgers kunnen uitoefenen. Voorbeelden zijn het stakingsrecht, dat werknemersorganisaties moeten kunnen uitoefenen jegens werkgevers (art. 6 lid 4 Europees Sociaal Handvest (herzien)) en het recht van vrouwen om op gelijke voet met mannen deel te nemen aan politieke partijen (art. 7 onder c Verdrag inzake de uitbanning van alle vormen van discriminatie van vrouwen). Op vergelijkbare wijze heeft het EHRM in diverse bepalingen van het EVRM een plicht voor de verdragsstaten gelezen om te verhinderen dat de uitoefening van het in deze bepaling aan burgers toegekende recht door andere private personen of ondernemingen teniet gedaan of ernstig belemmerd wordt.[65]

Globaal gesproken zijn er in de jurisprudentie van nationale rechters twee verschillende technieken of methoden te onderscheiden waarop zij het EVRM en eventueel andere mensenrechtenverdragen laten doorwerken in horizontale verhoudingen, d.w.z. rechtsverhoudingen tussen particulieren onderling. Wanneer een bepaling van een mensenrechtenverdrag aldus is geformuleerd of wordt uitgelegd dat zij de staat verplicht in zijn nationaal recht het in deze bepaling vervatte grondrecht ook in rechtsbetrekkingen tussen burgers onderling gestalte te geven, is het denkbaar dat de nationale rechter, als aan deze bepaling in de nationale rechtsorde kracht van wet (in een dualistisch systeem) of rechtstreekse werking (in een monistisch systeem) toekomt, daaraan het gevolg verbindt dat deze bepaling niet alleen de rechtsbetrekkingen tussen burger en overheid, maar ook tussen burgers onderling reguleert. In dat geval zal de rechter de bepaling ook in geschillen tussen private partijen toepassen, als hij daarmee kan voorkomen dat de staat het verdrag schendt. Zo heeft de Hoge Raad, nadat de wetgever er almaar niet in slaagde een wettelijke regeling van het stakingsrecht in het Staatsblad te krijgen, rechtstreekse werking toegekend aan de bepaling van artikel 6, vierde lid, van het Europees Sociaal Handvest en de mogelijkheid erkend dat (organisaties van) werknemers dit recht uitoefenen jegens werkgevers.[66] Wanneer de rechter deze techniek of methode hanteert, is er sprake van *directe horizontale werking* van het verdragsrecht. Deze methode is echter niet vrij van problemen en in de literatuur niet onomstreden. Mensenrechtenverdragen plegen namelijk geschreven te zijn met het oog op de verplichtingen van de staat. Het is aan zijn politieke en rechtsvormende organen om te beslissen in hoeverre zij gebruik willen maken van de clausules die aangeven onder welke voorwaarden de staat de uitoefening van de in het verdrag vervatte rechten en vrijheden mag

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[63] Zie de antwoorden in de landenrapporten op vraag 7 van de questionnaire.
[64] Art. 34 EVRM.
[65] Zie over het leerstuk van de horizontale werking van het EVRM Gerards 2011, hoofdstuk 5.
[66] HR 30 mei 1986, *NJ* 1986, 688 (Spoorwegstaking).

beperken. Critici wijzen erop dat de rechter wel kan toetsen of deze organen daarbij binnen de door deze beperkingsclausules aan de staat gelaten beleids- en beoordelingsvrijheid zijn gebleven, maar dat deze clausules veelal niet geschikt zijn om door de rechter zelf in horizontale verhoudingen te worden toegepast of verdisconteerd.

Daarentegen is de methode van *indirecte horizontale werking* in geen van de voor deze studie onderzochte landen omstreden. Hiervan is sprake als de rechter bij het vaststellen van een rechtsverhouding tussen private partijen rekening houdt met het EVRM of een ander verdrag door wettelijke voorschriften, open normen en discretionaire bevoegdheden in het nationaal recht uit te leggen en toe te passen op een wijze die aan dit verdrag tegemoet komt. Overigens is het onderscheid tussen directe en indirecte horizontale werking vloeiend. Beide technieken kunnen slechts slagen, indien de structuur van het nationaal recht voor de rechter voldoende aanknopingspunten biedt om aan het verdrag effect te geven in een rechtsverhouding tussen burgers onderling. In de praktijk zal de rechter zich ook niet altijd bekommeren om de vraag welke techniek hij nu precies in zijn uitspraak hanteert.[67]

2.3.4 Rang en toetsingsbevoegdheid

Hoezeer de vormgeving van monistische en dualistische stelsels per land kan verschillen, blijkt ook als we kijken naar de vraag welke plaats het internationaal recht of het in nationaal recht omgezet internationaal recht inneemt in de hiërarchie van rechtsnormen in de onderzochte landen en de vraag in hoeverre de nationale rechter bevoegd is nationale rechtsnormen te toetsen aan (de inhoud van) internationaal recht. De regel dat in een staat met een dualistisch stelsel de tot nationaal recht gemaakte regel van internationaal recht de rang heeft van de rechtshandeling waarmee deze transformatie tot stand is gebracht, blijkt niet steeds op te gaan. In Duitsland hebben verdragen waarmee de Bondsdag bij wet heeft ingestemd, inderdaad als gevolg van deze wet – waarin een opdracht aan de rechter wordt gelezen om (de rechtstreeks werkende bepalingen van) het goedgekeurde verdrag toe te passen – formeel de rang van een bondswet, zodat in geval van strijdigheid een later verdrag voorgaat op een eerdere bondswet en omgekeerd. Dit geldt ook voor het EVRM. Maar hoewel de Duitse rechtsleer in artikel 25 van het *Grundgesetz* de rechtshandeling leest die maakt dat het internationaal gewoonterecht behoort tot het binnen Duitsland geldende recht, verkrijgt het internationaal gewoonterecht daardoor niet dezelfde rang als het *Grundgesetz*. In de normenhiërarchie bevinden de algemene regels van volkenrecht zich tussen het *Grundgesetz* en de federale wetten.[68] Indien een Duitse rechter van oordeel is dat een federale wet of een landswet in strijd is met algemene regels van volkenrecht of met een verdrag waarmee de bondsdag heeft ingestemd en dat voor Duitsland in werking is getreden (inclusief het EVRM), dan dient hij hierover een prejudiciële vraag te stellen aan het constitutionele hof, het *Bundesverfassungsgericht*. Ten aanzien van lagere wettelijke voorschriften op federaal of landsniveau is de gewone rechter zelf bevoegd om te beslissen of deze buiten toepassing moeten blijven wegens strijd met algemene regels van volkenrecht of met rechtstreeks werkende bepalingen van verdragen die zijn goedgekeurd.[69]

In Zweden is het EVRM bij wet tot nationale wet verklaard, maar is de rechter krachtens de *Regeringsformen* (RF), zoals de Zweedse grondwet genoemd wordt, bevoegd en verplicht om wettelijke voorschriften – met inbegrip van 'acts of parliament' – buiten toepassing te laten, indien deze in strijd komen met het EVRM.[70] Het EVRM heeft dus in feite een quasi-constitutionele status in Zweden.[71]

[67] Zie ook par. 3.3.3.
[68] Zie het antwoord op vraag 3.b. in het Duitse landenrapport.
[69] Zie de antwoorden op de vragen 3 en 4 van het Duitse landenrapport.
[70] RF 2:19 juncto 11:14.
[71] Zie het antwoord op vraag 1 in het Zweedse landenrapport.

Ook in het Verenigd Koninkrijk wordt de Human Rights Act 1998 tot de 'constitutional statutes' gerekend,[72] maar daar zijn rechters niet bevoegd om voorschriften die bij of ingevolge een 'act of parliament' zijn vastgesteld, nietig te verklaren of buiten toepassing te laten wegens strijd met de EVRM-bepalingen die in de HRA worden opgesomd. Alleen de hogere rechters kunnen door middel van een 'declaration of incompatibility' de wetgever erop wijzen dat een dergelijk voorschrift in strijd is met een van deze bepalingen van het EVRM.[73] Naar huidig recht verplicht een 'declaration of incompatibility' de wetgever niet tot een aanpassing. Tot op heden heeft de wetgever in één geval geweigerd gevolg te geven aan een 'declaration of incompatibility', te weten in de kwestie van kiesrecht voor gevangenen.[74] De rechter in het Verenigd Koninkrijk is daarentegen wel bevoegd vanwege strijdigheid met de in de HRA opgesomde bepalingen van het EVRM een streep te halen door (rechts)handelingen van 'public authorities' die niet dwingend voortvloeien uit voorschriften die bij of krachtens 'primary legislation' zijn vastgesteld.[75]

Wat betreft de plaats van het internationaal recht in de normenhiërarchie en de vraag in hoeverre de rechter nationaal recht mag toetsen aan internationaal recht, zijn er dus grote verschillen tussen de landen die in dit onderzoek zijn betrokken. Dit geldt ook voor de staten die van oudsher een meer monistisch karakter hebben. In Nederland is al het internationaal recht dat bindend is voor de staat en dus deel uitmaakt van het binnen Nederland geldende recht van hogere orde dan wettelijke voorschriften, met inbegrip van de Grondwet en de wet in formele zin. De bevoegdheid en plicht van de rechter om voorschriften van de Grondwet, de wet in formele zin of lagere regelgeving buiten toepassing te laten, is echter beperkt tot gevallen waarin deze toepassing onverenigbaar is met een ieder verbindende, d.w.z. rechtstreeks werkende en bekendgemaakte, bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties (art. 94 Gw). De Nederlandse rechter is niet bevoegd wettelijke voorschriften, van welke rang ook, buiten toepassing te laten wegens strijd met internationaal gewoonterecht of met bepalingen van verdragen en besluiten van volkenrechtelijke organisaties die een ieder verbindende kracht missen. Voor de toetsingsbevoegdheid van de Nederlandse rechter is niet van belang of het betrokken verdrag parlementair is goedgekeurd. De rechter is bevoegd om zelfs de Grondwet buiten toepassing te laten wegens strijd met rechtstreeks werkende bepalingen die zijn vastgesteld bij of krachtens een verdrag dat door de Staten-Generaal niet met versterkte meerderheid is goedgekeurd en dus niet gezien werd als een verdrag dat afweek van de Grondwet (vgl. art. 93 lid 3 Gw). Overigens komt het in de praktijk niet of nauwelijks voor dat de rechter een bepaling van de Grondwet moet laten wijken voor een rechtstreeks werkende bepaling van verdragsrecht. Voor het EVRM betekent het voorgaande dat dit in Nederland boven de Grondwet staat en dat de rechter dit mag laten voorgaan op de Grondwet, de wet en lagere voorschriften. In de juridische literatuur bestaat wel enige discussie over de vraag of hij ook bevoegd is het Statuut voor het Koninkrijk der Nederlanden buiten toepassing te laten wegens strijd met een ieder verbindend verdragsrecht.[76]

In België staat het internationaal recht, en dus ook het EVRM, eveneens boven het nationaal recht in de normenhiërarchie. Wettelijke voorschriften, met inbegrip van wetten in formele zin en de Grondwet, worden door de rechter niet toegepast voor zover zij in strijd zijn met rechtstreeks werkende bepalingen van verdragen die zijn goedgekeurd en bekendgemaakt. Dit laat onverlet dat België geen partij mag worden bij een verdrag dat in strijd is met de grondwet; in dat geval moet dus eerst de grondwet worden gewijzigd. Binnen 60 dagen na bekendmaking van de wet of het besluit waarbij het verdrag is goedgekeurd, kan – ook door belanghebbende natuurlijke personen en rechtspersonen

[72] Zie het antwoord op vraag 10 in het landenrapport over het Verenigd Koninkrijk.
[73] Art. 4 HRA.
[74] Zie de antwoorden op de vragen 8 en 9 van het landenrapport over het Verenigd Koninkrijk.
[75] Art. 6 HRA.
[76] Zie het antwoord op vraag 4 in het Nederlandse landenrapport.

– aan het Grondwettelijk Hof verzocht worden om deze wet of dit besluit te vernietigen. Maar is het verdrag goedgekeurd, voor België in werking getreden en gepubliceerd, dan dient de rechter het verdrag – voor zover het rechtstreeks werkt – voor te laten gaan op daarmee onverenigbaar nationaal recht.[77]

In Frankrijk staat het internationaal recht in de normenhiërarchie tussen de grondwet en 'acts of parliament'. Op grond van artikel 55 van de *Constitution* is de Franse rechter bevoegd om (posterieure en anterieure) wetten buiten toepassing te laten wegens strijd met rechtstreeks werkende bepalingen van verdragen die zijn goedgekeurd en door Frankrijk zijn aanvaard. Lagere wettelijke voorschriften die onverenigbaar zijn met dergelijke bepalingen zullen door de rechter worden vernietigd. Uit artikel 55 van de *Constitution* wordt afgeleid dat de rechter overeenkomstige bevoegdheden heeft wanneer een wet of een lagere regeling in strijd is met internationaal gewoonterecht of rechtstreeks werkende bepalingen van besluiten van volkenrechtelijke organisaties. Voor het EVRM betekent dit dat de Franse rechter wetten wél, maar de grondwet niet aan dit verdrag kan toetsen. De *Conseil Constitutionnel*, het Franse constitutionele hof, kan vóórdat Frankrijk partij wordt bij een verdrag, op verzoek van bepaalde politieke ambten en entiteiten, uitspreken dat het verdrag ongrondwettig is. In dat geval moet de *Constitution* eerst worden aangepast voordat het verdrag goedgekeurd en door Frankrijk aanvaard mag worden. Als echter pas nadat het verdrag is goedgekeurd en voor Frankrijk in werking is getreden blijkt dat het afwijkt van de *Constitution*, zal de Franse rechter voorrang aan de *Constitution* moeten geven.[78]

2.3.5 Verdragsconforme uitleg en constitutionele toetsing

Uit alle landenrapporten komt naar voren dat de gevallen waarin de rechter daadwerkelijk een wet in formele zin (een 'act of parliament') in strijd acht met het EVRM en haar om die reden buiten toepassing laat (of – in het geval van de Britse rechter – een 'declaration of incompatiblity' afgeeft), betrekkelijk zeldzaam zijn. In het overgrote deel van de gevallen hanteert de rechter een methode die bekend staat als – of verwant is aan – verdragsconforme uitleg en toepassing van nationaal recht. Zij is gebaseerd op het rechtsvermoeden dat de staat het internationale recht niet heeft willen schenden. Dit rechtsvermoeden betekent dat die uitleg en toepassing van het nationaal recht de voorkeur verdient of moet worden gevolgd die strookt met de internationaalrechtelijke verplichtingen van de staat, behalve wanneer de betrokken regel van nationaal recht zich redelijkerwijs tegen deze uitleg en toepassing verzet. Zo heeft de Hoge Raad al in 1919 overwogen dat 'voorzeker niet – tenzij de tekst der wet daartoe dwingt – mag worden aangenomen, dat de Nederlandsche wetgever in eenige wet eenzijdig en eigenmachtig zou zijn afgeweken van hetgeen bij bekrachtigd tractaat met een vreemde mogendheid is overeengekomen'.[79] In 1990 herhaalt de Hoge Raad dat de Nederlandse rechter 'het Nederlandse recht zoveel mogelijk aldus dient uit te leggen en toe te passen dat de Staat aan zijn verdragsverplichtingen voldoet'.[80] In België is de presumptie dat de wetgever de internationale verplichtingen in acht heeft willen nemen, zelfs een inspiratiebron geweest voor de rechtspraak van het Hof van Cassatie dat een rechtstreeks werkende norm van internationaal recht voorgaat op een norm van Belgisch recht.[81]

Het Verenigd Koninkrijk heeft als enige van de in dit onderzoek betrokken landen het beginsel van verdragsconforme uitleg en toepassing van nationaal recht, althans voor zover het gaat om het EVRM, uitdrukkelijk in de wet vastgelegd. Artikel 3(1) HRA bepaalt dat, voor zover als mogelijk is, 'primary legislation and subordinate legislation must be read and given effect in a way which is com-

[77] Zie de beantwoording van vraag 3 in het Belgische landenrapport.
[78] Zie de beantwoording van de vragen 3 en 4 in het Franse landenrapport.
[79] HR 3 maart 1919, *NJ* 1919, p. 371 (Grenstractaat Aken).
[80] HR 16 november 1990, *NJ* 1992, 107.
[81] Zie de het antwoord op vraag 4.b in het Belgische landenrapport.

patible with Convention rights'. Daarbij moet bovendien bedacht worden dat de HRA de rechter opdraagt om rekening te houden met de rechtspraak van het EVRM wanneer hij te maken heeft met een kwestie waarin een van de in de HRA opgesomde bepalingen een rol speelt.[82]

Een bijzondere vorm van verdragsconforme uitleg doet zich voor in de rechtspraak van de constitutionele hoven van België, Duitsland en Frankrijk. Voor elk van deze hoven geldt dat zij - al dan niet via een prejudiciële procedure die aanhangig is gemaakt door een 'gewone' rechter - exclusief bevoegd zijn om te oordelen over de grondwettigheid van wetten. Geen van deze constitutionele hoven heeft formeel de bevoegdheid om wetten te toetsen aan verdragen. Maar alle drie interpreteren zij de in de nationale constitutie vervatte rechten en vrijheden, voor zover daar aanleiding toe bestaan, in het licht van het EVRM. In deze landen levert constitutionele toetsing een belangrijke bijdrage aan naleving van het EVRM.

2.4 Conclusie

Uit het hiervoor gegeven overzicht van de doorwerking van internationaal recht in de constitutionele ordes van de zes onderzochte staten blijkt dat die doorwerking op verscheidene manieren vorm heeft gekregen. Ook binnen de systemen die als monistisch dan wel dualistisch te boek staan, zijn er grote verschillen. Uiteraard heeft dit gevolgen voor de status van internationaal recht, in het bijzonder het EVRM, in de nationale rechtsorde. Waar de EVRM-rechten in Zweden en het Verenigd Koninkrijk voor individuen alleen inroepbaar zijn voor de rechter omdat zij in nationale wetgeving zijn omgezet, kunnen individuen in Nederland of België een rechtstreeks beroep doen op de EVRM-bepalingen. Ook de positie van verdragsbepalingen zoals die van het EVRM in de nationale normenhiërarchie verschilt sterk, net als de bevoegdheden van de nationale rechter om nationale normen te toetsen op hun verenigbaarheid met het internationale recht. Waar in Nederland en België zelfs de Grondwet buiten toepassing moet worden gelaten bij strijdigheid met rechtstreeks werkende verdragsbepalingen, is dat in de andere onderzochte staten anders. De status van het internationale recht is veelal ergens gelegen tussen een formele wet en de Grondwet. Daardoor kunnen wetten in het algemeen wel worden getoetst aan EVRM-bepalingen en waar nodig terzijde worden gesteld, maar wordt de Grondwet meestal onaantastbaar door de nationale rechter gevonden. Daarnaast zijn er nog vele bijzondere finesses en nuances in het nationale constitutionele recht die maken dat het voor de buitenstaander lang niet altijd gemakkelijk is om precies te weten wat de nationale rechter vermag als het gaat om de doorwerking van internationaal recht. Duidelijk is wel dat in alle onderzochte staten de rechter bevoegd (en soms zelfs verplicht) is tot verdragsconforme interpretatie van nationaal recht. Zoals hierna nog zal blijken, is vooral dit instrument een belangrijk vehikel als het gaat om de toepassing van het EVRM door de nationale rechters.

3. Omgang met uitspraken en ontvankelijkheidsbeslissingen van het EHRM

3.1 Inleiding

In de voorgaande paragrafen is duidelijk geworden welke constitutionele instrumenten er in het algemeen beschikbaar zijn voor nationale rechters om invulling te geven aan het EVRM en om de verdragsbepalingen in het nationale recht te laten doorwerken. Belangrijk is daarnaast dat het EHRM op grond van art. 32 EVRM de bevoegdheid heeft om het EVRM in laatste instantie te interpreteren. Het zijn deze interpretaties die in de praktijk grote invloed kunnen hebben op de nationale rechtspraak.

[82] Art. 2(1) HRA.

In deze paragraaf brengen wij in beeld op welke manier de invloed van de interpretatieve uitspraken van het EHRM zich in de nationale rechtspraak doet gevoelen. Daarbij gaan wij, op basis van het EVRM-rapport, allereerst in op de EVRM-kant van deze kwestie. Daarbij belichten we de vraag hoe het EHRM zelf de impact van zijn uitspraken ziet en wat het van nationale rechters verwacht (par. 3.2). Vervolgens gaan wij na hoe op nationaal niveau wordt gereageerd op deze eisen uit de EHRM-rechtspraak en hoe nationale rechters in de regel omgaan met uitspraken van het EHRM (par. 3.3). Wij doen dit wederom op basis van de antwoorden die in de landenrapporten zijn gegeven op de vragen die in dit verband zijn voorgelegd.[83]

3.2 De eisen gesteld door het EHRM

3.2.1 Res interpretata – bindende werking van EHRM-interpretaties

Op grond van art. 46 EVRM zijn de uitspraken van het EHRM uitsluitend bindend voor de partijen bij de voorgelegde zaak. Dit betekent dat alleen de verwerende staat op grond van het EVRM is gehouden om in een concreet geval gevolg te geven aan de constatering dat het EVRM is geschonden. De staat is vrij om te bepalen welke vorm dit gevolg moet hebben, al staat *restitutio in integrum* als doel voorop. Dat kan bijvoorbeeld omvatten het materieel zoveel mogelijk ongedaan maken van de schending (bijvoorbeeld door teruggave van onrechtmatig onteigend eigendom), de heropening van een reeds gesloten procedure, of het toekennen van een schadevergoeding.[84] De andere staten zijn niet verplicht om zo'n concreet gevolg te verbinden aan de constatering van een schending in een ander staat, zelfs niet als een vergelijkbare juridische of feitelijke situatie zich ook in hun eigen land zou voordoen. Kortom, de uitspraken van het EHRM hebben geen *erga omnes*-werking.

Uit het rapport over de rechtspraak van het EHRM is gebleken dat daarmee nog niet alles is gezegd over de rechtswerking van de uitspraken van het EHRM. Het EHRM is niet alleen bevoegd (op grond van art. 19 EVRM) om recht te spreken in geschillen over het EVRM, maar het heeft op grond van art. 32 EVRM ook de bevoegdheid om in laatste instantie de bepalingen van het EVRM te interpreteren.[85] Het is de bedoeling dat belangrijke interpretatiekwesties door de Grote Kamer van het Hof worden beslecht.[86] Algemeen wordt aangenomen dat de door het Hof gegeven interpretaties de bepalingen van het EVRM verder verfijnen en nuanceren. Heeft het EHRM in een concrete zaak uitleg gegeven aan een van de verdragsbepalingen, dan vormt die uitleg *res interpretata*. Dat wil zeggen dat de betekenis van de bepalingen van het EVRM wordt bepaald door de uitleg die het EHRM daaraan geeft; die uitleg heeft zogenaamd 'interpretatieve kracht'. De interpretaties van het EHRM geven dus inhoud of reliëf aan de verplichtingen die voor alle staten uit het EVRM voortvloeien. Staten kunnen dus ook niet afwijken van een gevestigde EHRM-interpretatie van het EVRM zonder hun verdragsverplichtingen te schenden. Dit *res interpretata* van de uitspraken van het Hof is in de literatuur aanvaard en is blijkens het EHRM-rapport de laatste jaren ook door het EHRM zelf steeds explicieter omarmd.

Uiteraard kan op nationaal niveau op verschillende manieren tegemoet worden gekomen aan de via de EHRM-rechtspraak verfijnde verdragsverplichtingen. Er vloeit bijvoorbeeld uit het EVRM geen rechtstreekse verplichting voort voor de nationale rechter om ervoor te zorgen dat zijn oordelen in overeenstemming zijn met de EHRM-rechtspraak. Zijn rechterlijke uitspraken echter in strijd met het EVRM (zoals geïnterpreteerd door het EHRM), dan is de staat wel verantwoordelijk te houden voor de daaruit voortvloeiende verdragsschending. Om te voorkomen dat de staat (bijvoorbeeld via een

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[83] Zie de bijlagen bij dit rapport.
[84] Zie klassiek EHRM 24 juni 1993, nr. 14556/89, *Papamichalopoulos t. Griekenland*.
[85] Zie par. 3.2 van het EHRM-rapport.
[86] Vgl. art. 43 EVRM.

individuele klacht in Straatsburg) verantwoording moet afleggen voor een dergelijke schending, kan de staat mogelijkheden creëren om dergelijke rechterlijke uitspraken te corrigeren. Hij kan bijvoorbeeld de geldende wetgeving wijzigen (waardoor schendingen in de toekomst worden voorkomen), of hij kan voorzien in een schadevergoedingsprocedure. Het EVRM zelf schrijft niet voor hoe in dit soort gevallen verdragsschendingen moeten worden voorkomen of geredresseerd.

3.2.2 Door het EHRM gestelde eisen aan de nationale rechter

Iedere verdragstaat is op zichzelf geheel vrij om te bepalen hoe wordt gewaarborgd dat binnen de staat in overeenstemming met het EVRM wordt gehandeld. Uit het EVRM-rapport blijkt dat het EHRM zich daarmee normaliter niet bemoeit. Het EHRM ziet de staat als een eenheid en beoordeelt slechts of binnen de staat als zodanig sprake is van een schending van het EVRM. Conform het internationale recht stelt het Hof in beginsel geen eisen aan de organisatie van de staat of de manier waarop de staat erin voorziet dat er gehandeld wordt in overeenstemming met het EVRM. Daarvoor te zorgen is primair de verantwoordelijkheid van de staat.[87] Vanuit zijn subsidiaire functie ziet het Hof slechts toe op de vraag of die verantwoordelijkheid ook daadwerkelijk in acht is genomen.

Is dit het internationaalrechtelijke uitgangspunt, dat ook wordt gedeeld door het Hof, uit de rechtspraak van het EHRM blijkt dat het Hof toch vaak verdergaande en meer precieze eisen stelt aan nationale overheidsinstanties en aan de modaliteiten van naleving van het EVRM.[88] Vanuit de staten is om die grotere duidelijkheid in de rechtspraak ook uitdrukkelijk gevraagd, onder meer in de verklaringen van Interlaken en Brighton. Dit past ook goed bij de klassieke bevoegdheidsverdeling tussen de staten en het EHRM, waarbij de primaire verantwoordelijkheid tot EVRM-naleving bij de staten is gelegen en de subsidiaire toezichtstaak bij het Hof. Het Hof heeft de laatste jaren de primaire taak van de staten benadrukt en deze verder verfijnd en gepreciseerd. In het EHRM-rapport is bijvoorbeeld gewezen op een (vrij impliciete) uitnodiging om een systeem in te richten van rechterlijke toetsing van wetgeving, waardoor de nationale rechter de bevoegdheid heeft om wettelijke bepalingen die in strijd zijn met fundamentele rechten (zoals ook gewaarborgd in het EVRM) terzijde te stellen. Daarnaast is er een inmiddels stevig gevestigde verplichting voor de nationale rechter om steeds te interpreteren in overeenstemming met de verdragsverplichtingen. Die verplichting geldt ook in horizontale verhoudingen: het EHRM verplicht de nationale rechter ertoe om bij de interpretatie van contracten tussen private partijen rekening te houden met de EVRM-rechten zoals uitgelegd door het EHRM. Meer in algemene zin heeft de rechter de verplichting om de volledige werking van het EVRM te waarborgen, bijvoorbeeld door nationale wetgeving EVRM-conform te interpreteren.

Deze rechtspraak van het EHRM maakt duidelijk dat nationale rechters onder het EVRM een eigen verantwoordelijkheid hebben om te verzekeren dat nationaal recht in overeenstemming is met het EVRM. Zoals aangegeven in par. 3.2.1 moeten zij daarbij in het bijzonder rekening houden met de uitspraken van het EHRM en moeten zij hun eigen rechtspraak zoveel mogelijk in overeenstemming met die uitspraken vormgeven. Dat nationale constitutionele beperkingen en verplichtingen daaraan in de weg kunnen staan, is voor het EHRM niet relevant: slechts de uitkomst telt, namelijk het handelen in overeenstemming met het EVRM en met de verantwoordelijkheden zoals vastgelegd in art. 1 EVRM.

3.2.3 Consequenties voor de nationale rechter

Uit de recentere rechtspraak van het EHRM vloeien relatief vergaande verplichtingen voort voor de nationale rechter, zoals in de voorafgaande paragraaf is besproken. De betekenis van het EVRM voor

[87] Vgl. art. 1 EVRM en zie ook par. 2.4 van het EHRM-rapport.
[88] Zie nader par. 3.3 van het EHRM-rapport.

de nationale rechtspraak is daardoor een bijzonder grote, ook al omdat het EHRM zich bij de definitie van deze verplichtingen niet veel gelegen laat liggen aan de constitutionele competenties van de nationale rechter. Bovendien is duidelijk dat de eisen van het EHRM aan de nationale rechtspraak vergaand kunnen zijn, vooral ook doordat het EHRM de bepalingen en begrippen van het EVRM op een vooruitstrevende manier heeft geïnterpreteerd. Door het gebruik van beginselen als die van evolutieve en meta-teleologische interpretatie (d.w.z. interpretatie aan de hand van de onderliggende doelstellingen en beginselen van het EVRM, zoals het garanderen van respect voor de menselijke waardigheid en de democratische rechtsstaat), en met steeds de notie van effectieve bescherming van grondrechten als richtsnoer, heeft het talrijke rechten en verplichtingen in het EVRM ingelezen waar de nationale rechter rekening mee moet houden.

Toch betekent dit niet dat het EHRM geen oog heeft voor de positie van de nationale rechter. Integendeel, uit het rapport over het EVRM blijkt dat het EHRM in zijn rechtspraak juist in zeer sterke mate rekening houdt met nationale rechtspraak en met de nationale rechter.[89] Weliswaar stelt het Hof eisen aan nationale rechtspraak en legt het zijn eigen uitleg van het EVRM op aan de nationale rechter, maar tegelijkertijd ziet het Hof heel scherp de noodzaak van subsidiariteit. Het lijkt er daarbij blijkens het EHRM-rapport op dat het Hof de nationale rechters vooral ziet als partners in een gemeenschappelijk project dat tot doel heeft de fundamentele rechten effectief te beschermen. Dit ‘partnerschap’ en het respect voor nationaal recht komt op verschillende manieren tot uitdrukking.

Allereerst blijkt het Hof zelf duidelijk grenzen te zien van zijn evolutieve en meta-teleologische interpretatie. In het EHRM-rapport is gewezen op tal van voorbeelden van zaken waarin het Hof niet kiest voor vergaande, brede interpretaties, maar zich eerder richt op de omstandigheden van het concreet voorliggende geval.[90] Door deze benadering van ‘rechterlijk minimalisme’ ontstaat er veel ruimte voor nationale autoriteiten om invulling te geven aan de uitspraken van het Hof. Nationale rechters kunnen bijvoorbeeld beredeneren dat een bepaalde uitspraak zag op een heel specifieke casuspositie en dat die uitspraak juist daardoor niet noopt tot wijziging van een vertrouwde rechtspraaklijn. Een andere benadering waarmee het Hof duidelijk het nationale recht beoogt te respecteren is de zogenaamde ‘vastklikbenadering’.[91] In die benadering geeft het Hof geen ‘sweeping statement’ waarmee het een heel brede uitleg geeft aan het EHRM, bijvoorbeeld door in algemene zin te erkennen dat alle socialezekerheidsuitkeringen van een bepaald type binnen het bereik van het eigendomsrecht komen, of dat eenouderadoptie beschermd wordt door het recht op respect voor het gezinsleven. In plaats daarvan gaat het Hof na of op een bepaald onderwerp naar nationaal recht bepaalde claims of aanspraken bestaan, en of dit onderwerp in brede zin binnen het bereik van het EVRM kan worden gebracht. Is dat het geval, dan is de conclusie dat de staat vrijwillig een rechtsregime in het leven heeft geroepen dat raakt aan EVRM-rechten. Ook al is het EVRM daarop niet ten volle van toepassing, het EHRM vindt dan wel dat minimale waarborgen als die van een eerlijk proces en gelijke behandeling ook voor die vrijwillig toegekende rechten moeten gelden. Daarmee behoudt de staat de nodige vrijheid. Hij kan immers beslissen om bepaalde rechten in het geheel niet toe te kennen om aan EVRM-bescherming te ontkomen. Bovendien is de EVRM-bescherming vooralsnog beperkt tot de genoemde waarborgen. Door deze ruimte expliciet aan de staat te laten respecteert het Hof de nationale beleidsvrijheid, terwijl het tegelijkertijd tegemoet komt aan het essentiële belang van bescherming van de EVRM-rechten.[92]

Uiteraard geldt, naast deze minder bekende mechanismen, dat het EHRM regelmatig een zekere *margin of appreciation* laat aan de staten.[93] Deze *margin of appreciation* komt er in het algemeen op neer dat het Hof zich terughoudend opstelt bij de beoordeling of de staat bij het beperken van een

[89] Zie vooral par. 3.5 van het EHRM-rapport.
[90] Zie par. 5.3 van het EHRM-rapport.
[91] Zie par. 4.5.3 van het EHRM-rapport.
[92] Zie par. 4.5 van het EHRM-rapport.
[93] Zie par. 3.4 van het EHRM-rapport.

grondrecht binnen de door een beperkignsclausule aan hem gelaten beoordelingsvrijheid is gebleven. Zo accepteert het Hof al snel dat nationale rechters beter dan het Hof in staat zijn om feitelijke beoordelingen te geven of belangenafwegingen te maken. Als de procedurele zorgvuldigheid maar voldoende is gewaarborgd, zullen de rechterlijke afwegingen al snel binnen de *margin of appreciation* van de staat blijven.[94] Vastgesteld is in het rapport echter ook dat de *margin of appreciation*-doctrine primair een instrument is voor het EHRM zelf, dat bepaalt hoe terughoudend of hoe intensief het zich heeft op te stellen jegens de staten. Voor nationale rechters is het in het algemeen een minder relevante doctrine, in die zin dat zij die niet één op één kunnen toepassen in hun eigen toetsing.

Hierboven is aangegeven dat het EHRM zich richt op het creëren van een soort 'partnerschap' met de nationale rechter.[95] Voor het onderhavige rapport is juist dit aspect van bijzonder belang. Het Hof heeft in zijn recentere rechtspraak veel vertrouwen getoond in nationale rechtspraak en in nationale rechterlijke procedures. Dit komt vooral tot uitdrukking in de in het EHRM-rapport beschreven methode van procedurele toetsing.[96] Bij procedurele toetsing gaat het EHRM na of op nationaal niveau recht is gedaan aan waarden van procedurele rechtvaardigheid en procedurele zorgvuldigheid. Is dat het geval, dan zal het Hof een nationale rechterlijke uitspraak (zelfs als daarmee inbreuk is gemaakt op een grondrecht) meestal respecteren en zal het die vaak zelfs niet meer aan een inhoudelijke EVRM-toets onderwerpen. Het EHRM doet daarmee recht aan het subsidiariteitsbeginsel en vertrouwt op de kwaliteit van de nationale rechtsgang.

Respect voor de nationale rechter, en het streven naar een partnerschap, blijkt ook uit die gevallen waarin het EHRM nadrukkelijk ingaat op een uitnodiging tot dialoog die in een nationale rechterlijke uitspraak besloten ligt.[97] Soms geeft een nationale rechter duidelijk aan een interpretatie van het EHRM niet met de eigen nationale constitutie te kunnen verenigen, en deze daarom niet te willen volgen.[98] In die gevallen onderzoekt het EHRM zorgvuldig of de eerder gegeven interpretatie inderdaad de juiste was. Hoewel dat niet altijd tot bijstelling leidt, leidt dit in ieder geval wel tot verfijning en verduidelijking van de rechtspraak. Ook geeft het Hof soms, op uitnodiging van een nationale rechter, aan of een verandering van rechtspraak – die is ingegeven door een eerdere veroordeling door het EHRM – in overeenstemming is met het EVRM. Door deze werkwijze kan een beter wederzijds begrip ontstaan tussen rechters en het EHRM over de beste manier om het EVRM uit te leggen en de fundamentele rechten te waarborgen. Tegelijkertijd hebben respondenten binnen het EHRM aangegeven dat er wel voorwaarden zijn om een effectieve dialoog mogelijk te maken.[99] In het bijzonder is het belangrijk dat nationale rechters hun kritieken en bezwaren voldoende duidelijk en concreet tot uitdrukking brengen, omdat het voor het Hof anders moeilijk is te weten waar de schoen wringt. Ook deelname van de nationale rechters aan het informele overleg dat het EHRM mogelijk maakt kan behulpzaam zijn. Een goede en meer geformaliseerde dialoog zou ook kunnen worden bevorderd door de (nu nog in ontwikkeling zijnde) procedure voor het vragen van advies door nationale rechters aan het EHRM over uitlegkwesties. Mits goed ingericht kan een dergelijke procedure de samenwerking nog verder verbeteren, ook al zal ook een adviseringsprocedure niet automatisch tot een soepele dialoog leiden.[100]

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[94] Vgl. par. 5.2 van het EHRM-rapport.
[95] Zie uitgebreid par. 3.5 van het EHRM-rapport.
[96] Zie par. 5.2 van het EHRM-rapport.
[97] Zie daarover in het bijzonder par. 6.2 van het EHRM-rapport.
[98] Zie ook hierna, par. 3.3.4
[99] Zie par. 6.2.4 van het EHRM-rapport.
[100] Zie par. 6.3.2 van het EHRM-rapport.

3.2.4 Conclusie

Uit het EVRM-rapport, zoals hierboven kort samengevat, kan worden afgeleid dat het EVRM potentieel zeer grote invloed heeft op nationale rechtspraak. De EHRM-uitspraken hebben *res interpretata* en omvatten daarmee bindende interpretaties van het EVRM. De staten, inclusief de nationale rechters, moeten deze uitspraken steeds in acht nemen willen zij hun verplichtingen onder het EVRM nakomen. Bovendien heeft het EHRM aangegeven dat nationale rechters hierbij een zelfstandige taak toekomt: zij moeten ervoor zorgen dat nationale wetgeving zoveel mogelijk in overeenstemming met het EVRM wordt geïnterpreteerd. Zeker waar het EHRM kiest voor vergaande interpretatiemethoden, en de nationale rechter die moet volgen vanwege de interpretatieve kracht van de uitspraken, is de grote impact van het EVRM op nationale rechtspraak hieruit evident.

Tegelijkertijd geldt dat het EHRM veel ruimte en vrijheid laat aan nationale autoriteiten, vooral ook nationale rechters, om de EVRM-rechten te garanderen. Niet alleen is er de bekende *margin of appreciation*-doctrine, maar ook beperkt het Hof de invloed van het EVRM en van zijn eigen interpretaties door doctrines te benutten als die van procedurele toetsing, de 'vastklikbenadering' en rechterlijk minimalisme. Bovendien streeft het Hof ernaar om zijn oordelen niet van bovenaf op te leggen, maar eerst en vooral samen te werken met nationale (hoogste) rechters. Daardoor beoogt het te komen tot interpretaties die niet alleen effectief de EVRM-rechten beschermen, maar die ook voldoende gedragen worden door de nationale rechterlijke 'partners'.

3.3 Bevindingen uit de landenrapporten

3.3.1 Inleiding

Hiervoor is uiteengezet dat het EHRM beoogt om door middel van dialoog en door middel van argumentatieve technieken en doctrines de staten en de nationale rechters te brengen tot interpretaties die verenigbaar zijn met de EHRM-rechtspraak. De grote vraag is echter hoe nationale rechters hierop reageren. Komen zij de door het EHRM aangenomen verplichtingen ook daadwerkelijk na? Hoe gaan zij hierbij om met hun eigen nationale bevoegdheden? En zijn er in het nationale recht knelpunten waar te nemen? Dergelijke vragen zijn aan de nationale rapporteurs voorgelegd en zij hebben hierop in hun landenrapporten antwoord gegeven. Hierna volgt een korte weergave van hun belangrijkste bevindingen; de uitgebreidere antwoorden (met verwijzingen naar relevante literatuur en rechtspraak) zijn terug te vinden in de bijlagen bij dit rapport.

3.3.2 Formele bevoegdheden om gevolg te geven aan uitspraken tegen de staat

Als eerder opgemerkt is de verwerende staat op grond van art. 46 EVRM verplicht om uitvoering te geven aan een uitspraak waarin een schending van het EVRM is geconstateerd. Nationale rechters kunnen hierbij op verschillende manieren worden betrokken.[101]

Allereerst bestaat in de onderzochte staten (met uitzondering van het Verenigd Koninkrijk) de mogelijkheid om een gerechtelijke procedure te heropenen als door procedurele onvolkomenheden een schending van het EVRM is veroorzaakt. De nationale rechter is dan verplicht een nieuwe uitspraak te doen met inachtneming van de uitspraak van het Hof. Deze mogelijkheid is niet vereist door het EHRM, al heeft dat wel verschillende malen aangegeven dat een heropeningsvoorziening een geschikte manier kan zijn om gevolg te geven aan uitspraken van het EHRM. Ook in aanbevelingen van-

[101] Zie hiervoor de antwoorden op vraag 15.a van de questionnaire.

uit de Raad van Europa is voor zo'n heropeningsmogelijkheid gepleit.[102] In Zweden zijn de mogelijkheden hiertoe overigens maar beperkt. Een schending die het EHRM heeft gevonden *kan* aanleiding vormen voor heropening, maar alleen als sprake is van een manifeste schending. In Frankrijk is een heropeningsmogelijkheid er alleen als de constatering van een schending door het EHRM heeft geleid tot nadelige gevolgen voor de betrokkene die niet met behulp van een schadevergoeding (toegekend op grond van art. 41 EVRM) ongedaan kunnen worden gemaakt. Een ruimere heropeningsmogelijkheid is er voor strafrechtelijke procedures in België, Nederland en Duitsland. Deze mogelijkheid is in deze staten voorzien in wetgeving, die in de meeste gevallen is aangenomen naar aanleiding van uitspraken waarin het EHRM de wenselijkheid van een mogelijkheid tot heropening heeft benadrukt. De werking van deze heropeningsprocedures is in alle onderzochte staten beperkt tot de individuele zaak die heeft geleid tot de Straatsburgse uitspraak. Er ontstaat dus geen recht voor derden die zich feitelijk en juridisch in een vergelijkbare situatie bevinden, om hun procedure te laten heropenen.

Voor Nederland en het Verenigd Koninkrijk is een vergelijkbare heropeningsmogelijkheid er niet voor civiele en bestuursrechtelijke procedures, al geldt voor bestuursrechtelijke procedures meestal wel de mogelijkheid om een nieuw besluit aan te vragen. In Duitsland bestaat de mogelijkheid van heropening van een civiele procedure wel, en in Zweden is voor administratieve procedures in een heropeningsmogelijkheid voorzien. De nationale strafrechters hebben in het algemeen echter meer ruimte om direct gevolg te geven aan een uitspraak van het EHRM tegen de staat dan civiele of administratieve rechters.

Daarnaast bestaat er soms de mogelijkheid om een gerechtelijke procedure te starten tot schadevergoeding als een EVRM-schending het gevolg is geweest van een rechterlijke uitspraak. In Nederland zijn de mogelijkheden daartoe beperkt. Op zichzelf is het denkbaar dat een actie uit onrechtmatige daad tegen de staat wordt ingesteld omdat de rechter dusdanige fouten heeft gemaakt dat in Straatsburg een schending van het EVRM is vastgesteld. Een dergelijk beroep is echter maar zelden succesvol. Alleen als duidelijk is dat het eerder ging om een manifeste schending van fundamentele rechten, zal de rechter een schadevergoeding toekennen of een beslissing in natura geven, zoals vrijlating uit de gevangenis. Een mogelijkheid tot het instellen van een schadevergoedingsprocedure tegen de staat bestaat ook in Zweden en Frankrijk, maar deze procedures kunnen slechts in relatief beperkte omstandigheden effectief worden benut. In het Verenigd Koninkrijk kan in een procedure tegen de staat worden verzocht om beëindiging van, bijvoorbeeld, een detentie die in strijd met art. 5 of 6 EVRM is opgelegd, maar van deze mogelijkheid wordt weinig gebruik gemaakt; het is in het Verenigd Koninkrijk gebruikelijk dat uitspraken van het EHRM niet via een rechterlijke procedure (een heropeningsprocedure of procedure tot staatsaansprakelijkheid), maar via de uitvoerende macht ten uitvoer worden gelegd.

Ten slotte is voor sommige stelsels gewezen op nationale rechtspraak op grond waarvan, in navolging van de eisen die het EHRM heeft gesteld, de rechter schadevergoeding kan toekennen als een rechterlijke procedure langer heeft geduurd dan redelijk is of de duur van de gevangenisstraf kan bekorten. Die mogelijkheid bestaat in ieder geval in Nederland en in Zweden.

3.3.3 Frequentie van verwijzen naar EHRM-rechtspraak; acceptatie van res interpretata

In alle onderzochte landen verwijzen nationale rechters regelmatig naar EHRM-uitspraken.[103] Als in Nederland beroep is gedaan op een EVRM-recht, houdt de Nederlandse rechter steeds zo goed moge-

[102] Zie in het bijzonder Recommendation R(2000)2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, 19 januari 2000.
[103] Zie de beantwoording in de landenrapporten van vraag 14 van de questionnaire.

lijk rekening met de EVRM-interpretaties en past hij de criteria en voorwaarden toe die het EHRM voor een bepaald gevalstype heeft ontwikkeld. Daarbij maakt het geen verschil of Nederland partij was bij de zaak waarop de uitspraak betrekking had – de nationale rechters accepteren duidelijk het *res interpretata* van de EVRM-uitspraken. Dezelfde situatie is zichtbaar voor België, Duitsland en Frankrijk, waar rechters ook frequent naar de EHRM-rechtspraak verwijzen en waar eveneens het *res interpretata*-karakter van de uitspraken wordt gerespecteerd. In het Verenigd Koninkrijk verwijst de rechter eveneens stelselmatig naar EHRM-rechtspraak. Bijzonder is wel dat de verplichting tot het in acht nemen van deze rechtspraak hier niet wordt afgeleid uit het EVRM of de rechtspraak van het EHRM, maar uit de *Human Rights Act*. De HRA voorziet namelijk in de expliciete verplichting voor de nationale rechter om bij de uitleg van de fundamentele rechten rekening te houden met het EVRM. Voor Zweden, waar rechters lange tijd minder bevoegdheden hadden tot EVRM-toepassing dan in andere staten, is aangegeven dat slechts zelden naar rechtspraak van het EHRM wordt verwezen. De Zweedse rechters zijn bijzonder terughoudend als het gaat om het geven van een interpretatie in het licht van het EVRM-*acquis*, vooral omdat zij niet veel ervaring hebben met rechtsvinding op basis van rechterlijke uitspraken. Zij geven de voorkeur aan uitleg op basis van klassieke interpretatiemethoden, zoals verwijzing naar de wetsgeschiedenis.

In het EHRM-rapport is aangegeven dat het EHRM verlangt dat staten het *res interpretata* van zijn uitspraken accepteren en daarnaar handelen. Daarnaast is uitgelegd dat het een positieve verplichting aan nationale rechters heeft opgelegd om, zeker in civielrechtelijke zaken tussen individuen, het EVRM in acht te nemen. Dat betekent onder meer dat de nationale rechter ook contractuele bepalingen moet uitleggen in overeenstemming met het EVRM.[104] Het blijkt dat deze verplichting in de onderzochte staten steeds in acht wordt genomen: alle onderzochte rechters passen het EVRM en de EHRM-uitspraken met enige regelmaat toe in horizontale rechtsverhoudingen.[105] Terwijl de Franse rechter dit vaak rechtstreeks doet – dus door toepassing van de EVRM-bepalingen als zodanig – doen de andere rechters (inclusief de Nederlandse) dit meestal indirect. Dat betekent dat zij in de meeste gevallen ervoor kiezen bepalingen van nationaal (privaat)recht zo uit te leggen en toe te passen dat zij in overeenstemming zijn met de rechtspraak van het EHRM. De Zweedse rechter is het meest terughoudend als het gaat om horizontale werking, vooral omdat rechters aarzelen over de wijze waarop zij daaraan invulling kunnen en mogen geven.[106]

3.3.4 Aanpassing van rechtspraak als gevolg van EHRM-uitspraken

In alle onderzochte rechtsstelsels leiden uitspraken van het EHRM meer dan eens tot bijstellingen van de eigen rechtspraak. Daarbij maakt het in beginsel geen verschil of de uitspraak tegen de eigen staat is gericht – het *res interpretata* is leidend.[107] De Nederlandse strafrechter heeft bijvoorbeeld verschillende keren zijn rechtspraak aangepast naar aanleiding van uitspraken van het EHRM.[108] Ook voor België, Duitsland, Frankrijk en het Verenigd Koninkrijk is aangegeven dat het een gevestigde praktijk is om de rechtspraak te wijzigen als een uitspraak van het EHRM daartoe aanleiding geeft. Alleen de Zweedse rechter toont zich vooralsnog terughoudender. Dit kan worden verklaard door het feit dat deze rechter niet echt vertrouwd is met toepassing van het EVRM en de EHRM-rechtspraak. De Zweedse rechter gebruikt vooral methoden van wetgevingsinterpretatie (zoals interpretatie aan de hand van wetsgeschiedenis) en heeft weinig ervaring met interpretatie op basis van rechterlijke uitspraken, zoals de uitspraken van het EHRM. Voor rechters die bekender zijn met

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[104] Zie het EHRM-rapport, in het bijzonder par. 3.3 en de daar geciteerde rechtspraak.
[105] Zie de beantwoording van vraag 7 van de questionnaire in de landenrapporten; zie nader ook hierboven, par. 3.3.
[106] Zie het antwoord op vraag 7 in het Zweedse landenrapport.
[107] Zie de beantwoording in de landenrapporten van de vragen 15 en 16 van de questionnaire.
[108] Zie in het bijzonder de beantwoording van vraag 15.c van de questionnaire.

interpretatie aan de hand van precedenten (zoals veel constitutionele hoven, maar ook de Nederlandse rechter) lijkt dit een minder groot probleem te vormen.

Hoewel alle nationale rechters (met uitzondering van de Zweedse) regelmatig naar EHRM-uitspraken verwijzen, is zeker geen sprake van een slaafs navolgen van deze uitspraken.[109] Voor Nederland is bijvoorbeeld aangegeven dat de hoogste rechters met enige regelmaat de criteria en standaarden van het EHRM iets bijstellen om deze beter in te kunnen passen in het eigen systeem. Ook wordt af en toe een minimalistische interpretatie van de EHRM-rechtspraak gekozen, in die zin dat wordt gekozen voor een interpretatie die weliswaar voldoet aan de EHRM-eisen, maar die het nationale recht zo min mogelijk beïnvloedt. Ook voor Frankrijk is aangegeven dat de rechter uitspraken soms naar zijn hand zet, al is benadrukt dat de Franse rechter de rechtspraak van het EHRM zo zorgvuldig mogelijk beoogt te volgen. Voor België is het duidelijker dat de nationale rechter soms reserves heeft over EHRM-uitspraken en dat de rechter soms kiest voor afwijkingen of creatieve interpretaties die de door het Hof gegeven uitleg gemakkelijker aanvaardbaar maken. In dat opzicht lijkt de Belgische benadering op de Nederlandse. Ook in Duitsland is het 'kneden' van EHRM-criteria en voorwaarden om ze in te passen in het nationale recht gebruikelijk, al geldt daar als hoofdregel dat dit kneden niet mag leiden tot daadwerkelijke afwijkingen van EHRM-uitspraken. In het Verenigd Koninkrijk volgen rechters in het algemeen nauwkeurig de door het EHRM gegeven uitleg, maar staan de EHRM-uitspraken in rechtskarakter niet gelijk aan een nationaal precedent. Lagere rechters zijn daardoor gehouden om de nationale rechtspraak toe te blijven passen, ook al is die ogenschijnlijk strijdig met een EHRM-uitspraak, totdat een hogere rechter de nationale precedenten in overeenstemming heeft gebracht met het EVRM-recht. Daarbij vindt in het algemeen een inpassing van de EHRM-criteria plaats in de eigen nationale systematiek.

Een volledig terzijde stellen van EHRM-uitspraken, omdat deze in strijd zouden zijn met de eigen, nationale uitleg, komt slechts zelden voor.[110] Voor Nederland is hiervan slechts een recent voorbeeld gegeven, dat bovendien niet heel dogmatisch is onderbouwd.[111] In andere staten is de dogmatiek sterker. Het Britse Supreme Court bijvoorbeeld heeft aangegeven zich, strikt genomen, niet gebonden te voelen door EHRM-uitspraken waaruit blijkt dat het Straatsburgse Hof het nationale recht niet goed heeft begrepen of die het Supreme Court ronduit onjuist vindt. Tegelijkertijd resulteert dit uitgangspunt bijna nooit in het niet opvolgen van een EHRM-uitspraak en het daarvoor in de plaats stellen van de eigen, nationale uitleg. Relevante EHRM-uitspraken blijken in de praktijk vrijwel steeds leidend te zijn voor de nationale uitleg. Bekend is verder dat het Duitse federale constitutionele hof zich in theorie bereid heeft getoond om Straatsburgse uitspraken opzij te schuiven als die niet met fundamentele constitutionele waarden verenigbaar zijn. In het Duitse rapport is echter benadrukt dat van deze mogelijkheid vooralsnog geen gebruik is gemaakt. Hoofdregel blijft ook hier dat EHRM-precedenten moeten worden nageleefd. Lagere rechters die dit weigeren te doen (bijvoorbeeld vanwege constitutionele bezwaren), worden door hogere rechters vaak zelfs gecorrigeerd. De Belgische rechter zal evenmin snel een EHRM-uitspraak terzijde schuiven. In het enkele geval waarin dit voorkomt, wordt een afwijking van de EHRM-rechtspraak bovendien zeer uitvoerig gemotiveerd. Hoewel in veel staten daarmee impliciete of expliciete constitutionele veiligheidskleppen zijn ingebouwd, en er duidelijk ruimte bestaat om soms de nationale uitleg te laten prevaleren boven die van het EHRM, zal de toepassing daarvan slechts in zeer uitzonderlijke gevallen zichtbaar zijn.

[109] Zie ook hiervoor de antwoorden op vragen 15c en 16c van de questionnaire.
[110] Zie hiervoor de beantwoording van vragen 15.c en 16.c van de questionnaire in de verschillende landenrapporten.
[111] HR 12 februari 2013, *LJN* BY8434, *NJ* 2013/161; zie nader de beantwoording van vraag 15.c in het Nederlandse landenrapport.

Doen weigeringen om gevolg te geven aan de EHRM-jurisprudentie zich toch voor, dan kan dit, zoals in par. 3.2 is aangegeven, soms leiden tot een procedure voor het EHRM. Het EHRM ziet in zo'n nationale uitspraak dan meestal aanleiding om zowel de nationale interpretatie onder de loep te nemen als de eigen, in de eerdere uitspraak ontwikkelde criteria.[112] Dit leidt dan tot een soort dialoog tussen nationale rechters en het EHRM, zoals besproken is in het EHRM-rapport. Meestal duurt dit tweegesprek maar kort. Voor Duitsland gold bijvoorbeeld dat, na veroordelingen van Duitsland op het terrein van privacybescherming en bescherming van habeas-corpusrechten, de nationale rechter zijn uitspraak aanpaste aan de EHRM-rechtspraak. In beide gevallen werden daarover nieuwe zaken voorgelegd aan het EHRM, waarin het EHRM naging of de nieuwe interpretaties voldoende correspondeerde met de EHRM-uitgangspunten. Omdat het EHRM constateerde dat dit het geval was, waren verdere aanpassingen niet meer nodig en werd de dialoog beëindigd. In andere gevallen is het gesprek langduriger geweest. Zo is voor België gewezen op een al ouder voorbeeld waarin het Hof van Cassatie weigerde een uitspraak van het EHRM op te volgen.[113] Hierover werd opnieuw een zaak voorgelegd aan het EHRM, dat vaststelde dat er door de gebrekkige tenuitvoerlegging nog steeds sprake was van een schending. Daarop paste de nationale hoogste rechter de rechtspraak aan. Meest complex en uitgesponnen is de dialoog waarin het Verenigd Koninkrijk en het EHRM momenteel verwikkeld zijn op het terrein van het gebruik van 'hearsay evidence', dus verklaringen van getuigen die niet zelf kunnen worden ondervraagd. Daarover bestond al een uitgebreide rechtspraak van het EHRM, waarin ook veroordelingen jegens het Verenigd Koninkrijk waren uitgesproken, maar de Britse hoogste rechter weigerde expliciet om de EHRM-criteria over te nemen omdat die niet goed verenigbaar zouden zijn met de eigen uitgangspunten van het strafrecht. Daarop volgde opnieuw een procedure bij het EHRM, waarbij de Grote Kamer weliswaar de uitgangspunten uit de eerdere uitspraken wat bijstelde, maar een aantal van de Britse bezwaren van de hand wees. Het wachten is nu op een nieuwe uitspraak van het Britse Supreme Court om te zien of de bijgestelde eisen zullen worden aanvaard en, zo niet, of dit zal leiden tot een nieuwe procedure voor het EHRM.

3.3.5 Verdergaande bescherming en het 'mirror principle'

Alle nationale rechters die in dit onderzoek zijn betrokken hanteren als uitgangspunt dat zij het nationale recht in overeenstemming met de EHRM-rechtspraak moeten interpreteren en dat zij geen lager beschermingsniveau mogen bieden dan het door het EHRM gegarandeerde minimum. Afwijkingen van de EHRM-rechtspraak zijn in theorie vrijwel overal aanvaard als zij nodig zijn om een voldoende hoog beschermingsniveau van grondrechten te garanderen. In de praktijk is van dergelijke afwijkingen echter slechts hoogst zelden sprake, zoals besproken in par. 3.3.3.

Een andere situatie die zich kan voordoen is dat een duidelijk EHRM-precedent, waaruit blijkt welke bescherming minimaal aan een EVRM-recht moet worden geboden, ontbreekt. De vraag rijst dan of de nationale rechter autonoom te werk kan gaan, in die zin dat hij welbewust een eigen, nieuwe interpretatie geeft van een EVRM-recht die duidelijk verder gaat dan wat het EHRM tot dat moment in zijn rechtspraak heeft aanvaard.[114] Artikel 53 van het EVRM biedt daarvoor ruimte. Duidelijk is echter dat geen van de onderzochte rechters gecharmeerd is van deze mogelijkheid en dat zij, expliciet of impliciet, bij voorkeur een 'mirror principle' hanteren. Dit beginsel ontleent zijn naam aan een uitspraak van het Britse Supreme Court, waarin Lord Bingham overwoog dat de nationale rechter tot taak heeft om de EVRM-uitleg van het EHRM te 'spiegelen'. Dat betekent uiteraard dat de nationale rechter in zijn uitspraken rekening moet houden met de EHRM-rechtspraak en dat hij geen lager

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[112] Zie par. 6.2.2 en 6.2.3 van het EHRM-rapport.
[113] Zie het antwoord op vraag 16.c in het Belgische landenrapport.
[114] Zie nader de antwoorden op vraag 16.a in de landenrapporten.

beschermingsniveau mag bieden. Het betekent echter ook dat hij niet in positieve zin mag afwijken, in die zin dat hij besluit om verdergaande bescherming te bieden dan volgens de EHRM-rechtspraak is vereist. In het Verenigd Koninkrijk zijn voor deze spiegelbenadering verschillende redenen gegeven, die vooral te maken hebben met de constitutionele taakstelling van de rechter. Zou de rechter verdergaande bescherming bieden, dan zou feitelijk sprake zijn van rechtsvorming. De taak tot rechtsvorming berust echter niet bij de rechter, maar bij de wetgever. In Nederland wordt eveneens een spiegelbenadering gekozen, op basis van een vergelijkbare redenering. Ook de Hoge Raad heeft uitdrukkelijk aanvaard dat het niet aan hem is om verdergaande bescherming te bieden aan grondrechten dan het EHRM vereist. Hetzelfde geldt voor Frankrijk: ook daar is bij het bieden van meer bescherming niet de rechter, maar de wetgever aan zet.
Andere nationale rechters zijn minder uitgesproken als het gaat over het bieden van additionele bescherming. Zo is voor België aangegeven dat geen van de hoogste rechters ooit uitdrukkelijk aandacht heeft besteed aan het onderwerp. Toch kan ook daar uit een rechtspraakanalyse worden afgeleid dat feitelijk geen verdergaande uitleg aan het EVRM wordt gegeven. Als de wens al leeft om een sterkere bescherming te geven aan grondrechten dan het EHRM in zijn rechtspraak garandeert, dan wordt bovendien eerder gekozen voor een beroep op een grondwettelijk gegarandeerd recht. Hetzelfde lijkt voor Duitsland te gelden: als men de bescherming geboden door het EHRM te beperkt vindt, wordt dat vrijwel altijd opgevangen door een beroep te doen op een grondwettelijk grondrecht. Door deze terugvaloptie is er in beide landen ook minder behoefte aan verdergaande EVRM-interpretatie dan in staten waarin een duidelijke constitutionele grondrechtencatalogus ontbreekt, zoals Nederland en het Verenigd Koninkrijk.

3.3.6 Het overnemen van typische EVRM-doctrines

Uiteraard geeft het stelselmatig verwijzen naar EHRM-rechtspraak door nationale rechters al aan dat de Straatsburgse jurisprudentie grote invloed heeft op de nationale rechtspraak. Nationale rechters volgen zorgvuldig de criteria en standaarden die het Hof voor bepaalde gevalstypen heeft ontwikkeld en wijken daar alleen van af als daarvoor gegronde redenen bestaan. De gebruikte criteria en standaarden zijn meestal heel specifiek gedefinieerd voor bepaalde soorten zaken. Zo heeft het Hof een lijstje van omstandigheden verschaft waarin een rechterlijke procedure onredelijk lang moet worden gevonden, is er heel gedetailleerde rechtspraak over de criteria die moeten worden betrokken bij de beoordeling van smaadzaken of zaken over de uitzetting van minderjarige vreemdelingen, en is er een specifiek juridisch kader gedefinieerd voor de beoordeling van beperkingen van socialezekerheidsuitkeringen. Dergelijke concrete en specifieke kaders, criteria en factoren zijn vaak goed bruikbaar en gemakkelijk inpasbaar voor de nationale rechter.

Een andere vraag is of nationale rechters soms een stap verder gaan en bij wijze van spreken op dezelfde manier gaan denken en redeneren als het EHRM dat doet. In een nationale rechterlijke procedure kunnen nieuwe uitlegvragen opkomen, die nog niet zijn beantwoord door het EHRM. Dergelijke uitlegvragen kunnen natuurlijk worden beantwoord aan de hand van nationale, klassieke interpretatiemethoden, zoals die van tekstuele interpretatie. Van een echte, diepe en vergaande beïnvloeding van de nationale rechter door het EVRM en de EHRM-rechtspraak zou echter sprake zijn als de nationale rechter probeert dit soort uitlegvragen te beantwoorden aan de hand van typische EHRM-beginselen en methoden: meta-teleologische interpretatie, evolutieve interpretatie of consensusinterpretatie. Evenzeer kan een diepe beïnvloeding zichtbaar zijn als andere typische EVRM-noties worden toegepast door de nationale rechter, zoals 'noodzakelijkheid in een democratische samenleving' of de *margin of appreciation*-doctrine, zelfs buiten de context waarvoor zij zijn ontwikkeld. Om deze diepe beïnvloeding te kunnen inschatten is aan de landenrapporteurs gevraagd om aan te geven

of en in welke mate dit soort autonoom gebruik van typische EVRM-methoden en -doctrines zichtbaar is.[115]

Waar het gaat om interpretatie en reikwijdtebepaling, zijn voorbeelden van zelfstandig gebruik van EVRM-methoden zeldzaam. In de Duitse, Belgische en Zweedse rechtspraak doen zich zelfs helemaal geen expliciete gevallen voor. Een voorbeeld is wel gegeven in het Nederlandse rapport, waarbij de Centrale Raad van Beroep (CRvB) aan de hand van een meta-teleologische benadering het EVRM toepaste in een nieuwe context. De CRvB gebruikte daarbij het centrale EVRM-beginsel van menselijke waardigheid om te beredeneren dat in sommige gevallen een bestaansminimum aan illegalen moet worden gegarandeerd.[116] In veruit de meeste gevallen verwijst de rechter echter eerder naar een concreet EHRM-precedent, zonder de daaraan ten grondslag liggende interpretatiemethoden nader te noemen en zonder dit soort methoden zelfstandig te gebruiken. In het Verenigd Koninkrijk worden de interpretatieve beginselen wel relatief vaak genoemd, maar lijkt de rechter daarmee vooral lippendienst te bewijzen aan de EHRM-rechtspraak, zonder dat er daadwerkelijke invloed is op de interpretatie in een concreet voorliggend geval. Dit is overigens anders voor de consensusinterpretatie, waarvan in het Verenigd Koninkrijk daadwerkelijk een aantal gevallen te vinden zijn. In de in het Britse landenrapport genoemde zaken oordeelde de rechter dat geen intensieve toetsing moest worden toegepast of dat geen nieuwe interpretatie hoefde te worden gegeven vanwege de sterk uiteenlopende opvattingen over een bepaald recht in Europa.

De *margin of appreciation*-doctrine spreekt kennelijk wel sterk tot de verbeelding van nationale rechters.[117] Vooral in Nederland wordt deze doctrine regelmatig ingeroepen, vaak echter op een onjuiste manier. Als het EHRM in een bepaald situatietype (bijvoorbeeld in zaken over sociale zekerheid) een ruime *margin of appreciation* aan de staat laat, leidt de Nederlandse rechter daar meestal zonder meer uit af dat die *margin of appreciation* toekomt aan de wetgever. Om die reden stelt de rechter zich in dit soort gevallen vrijwel steeds terughoudend op. Dat de doctrine niet is ontwikkeld voor gebruik door de nationale rechter, maar een mechanisme vormt voor het Europese Hof om zich te positioneren tegenover *alle* nationale autoriteiten, wordt daarbij niet of nauwelijks onderkend. Voor het Verenigd Koninkrijk geldt iets vergelijkbaars, al is daar expliciet aanvaard dat de doctrine niet voor nationale rechters is bedoeld. Ook hier passen nationale rechters veelal onverkort de *margin of appreciation*-doctrine toe. In België gebeurt dit eveneens, maar duidelijk minder stelselmatig dan in Nederland en zeker ook niet door alle rechterlijke instanties. In Duitsland en Zweden daarentegen zijn van een dergelijke toepassing geen voorbeelden terug te vinden. Voor Zweden kan dit worden verklaard door de daar bestaande, meer algemeen geldende terughoudendheid bij het toepassen van EHRM-rechtspraak en daarin ontwikkelde criteria en doctrines; opvallend is in ieder geval dat er wel een vergelijkbare, eigen doctrine wordt toegepast.

Het algemene beeld is daarmee dat nationale rechters wel zorgvuldig de EHRM-criteria volgen, maar niet zo diepgaand beïnvloed zijn door de typische EHRM-benadering dat zij geneigd zijn de EVRM-interpretatiemechanismen in hun eigen rechtspraak te incorporeren. Dit is alleen anders voor de *margin of appreciation*-doctrine, die vooral in Nederland enthousiast wordt gebruikt. Tegelijkertijd moet daarbij worden opgemerkt dat juist deze doctrine niet leidt tot een verdergaande toetsing aan het EVRM, en een grotere invloed van de grondrechten op het nationale recht door middel van rechterlijke toetsing. Eerder resulteert deze toepassing in een minder grote doorwerking van het EVRM.

[115] Zie de vragen 17 en 19 in de questionnaire.
[116] Zie het antwoord op vraag 19 in het Nederlandse landenrapport.
[117] Zie de antwoorden op vraag 17 van de questionnaire in de verschillende landenrapporten.

Precies de toepassing van de *margin of appreciation*-doctrine zorgt immers voor een terughoudende rechterlijke opstelling jegens de wetgever.

3.3.7 Positionering tegenover de andere staatsmachten – terughoudende en intensieve rechterlijke toetsing aan het EVRM

Een vergaande invloed van het EVRM op de nationale rechtspraak zou ook kunnen blijken uit een diepgaande, strikte toetsing aan de EVRM-rechten door de nationale rechter, waarbij de nationale wetgever en het nationale bestuur minder ruimte krijgen toebedeeld dan wanneer er geen grondrechten op het spel staan. Uit de nationale rapporten blijkt echter dat in geen enkele staat van zo'n stelselmatig striktere toetsing sprake is als er EVRM-rechten op het spel staan.[118] Als in Nederland sprake is van toetsing van besluiten of wetgeving, laat de rechter in het algemeen de nodige ruimte aan bestuursorgaan of wetgever. Daarbij beroept hij zich ofwel op het bestaan van beoordelings- of beleidsvrijheid, ofwel op de aanwezigheid van een *margin of appreciation* voor wetgever of bestuur. Slechts hoogst zelden voert de rechter een werkelijk intensieve toetsing uit van de rechtvaardiging van een grondrechteninbreuk; dat gebeurt alleen als daarvoor goede redenen bestaan, bijvoorbeeld als sprake is van een ernstige grondrechtenaantasting of een ongelijke behandeling op een 'verdachte' grond van onderscheid.

In de andere onderzochte staten is dit niet veel anders. In Zweden bestond lange tijd zelfs de constitutionele regel dat een rechter alleen een wet in strijd met de Grondwet (en het EVRM) mocht verklaren als sprake was van een manifeste schending daarvan. Deze regel is in 2011 gewijzigd: het vereiste van een kennelijke schending is uit de Zweedse Grondwet geschrapt. Vooralsnog heeft dat echter niet geleid tot een wezenlijk andere houding van de Zweedse rechter. De terughoudendheid om wetgeving aan grondrechtelijke bepalingen te toetsen is nog steeds groot en in feite wordt de regel van 'manifeste schending' nog steeds toegepast.

Voor Duitsland en Frankrijk heeft zo'n vereiste van een kennelijke schending nooit bestaan. Iedere constatering van een schending van grondrechten (al dan niet vervat in het EVRM) moet daar leiden tot nietigverklaring van de relevante regelgeving. In Frankrijk is de toetsing van proportionaliteit in zaken die duidelijk over EVRM-rechten gaan dan ook vrij strikt.

De Belgische rechters kiezen in het algemeen voor een benadering die vergelijkbaar is met de Nederlandse. Het uitgangspunt is ook in België dat de rechter zich terughoudend opstelt als sprake is van discretionaire bevoegdheden voor wetgever en rechter. Een besluit van een bestuursorgaan zal bijvoorbeeld alleen terzijde worden geschoven als het kennelijk willekeurig of evident onredelijk is. Het feit dat een geschil betrekking heeft op fundamentele rechten maakt daarvoor *a priori* geen verschil, al zal in de beoordeling van de belangenafweging wel worden nagegaan of bij de besluitvorming voldoende rekening is gehouden met het gewicht van het betrokken grondrechtelijke belang. Voor het Verenigd Koninkrijk geldt ten slotte iets soortgelijks. De plicht tot terughoudendheid voor de rechter komt in de Human Rights Act al tot uitdrukking door het verbod op het terzijde stellen of vernietigen van bepalingen van wetgeving. Rechters hebben in verband hiermee aangenomen dat de wetgever een grote beleidsvrijheid toekomt en dat niet te snel mag worden ingegrepen in de door de wetgever gemaakte afwegingen. Tegelijkertijd blijkt de toetsing in de praktijk soms wel te worden aangescherpt. In het bijzonder is het respect voor discretionaire vrijheid van het bestuur beduidend minder groot dan het respect voor de vrijheid van de wetgever. Daarbij geldt dat in de Britse rechtspraak veel aandacht bestaat voor het bepalen van de precieze omvang van de toetsing aan de Human Rights Act. Langzaamaan worden hierbij aanknopingspunten geformuleerd die bij deze vaststelling kunnen helpen.

[118] Zie de antwoorden op vraag 18 van de questionnaire in de verschillende landenrapporten.

3.4 Conclusie

Op basis van de landenrapporten kan worden vastgesteld dat in vrijwel alle onderzochte rechtssystemen grote waarde wordt toegekend aan uitspraken van het EHRM. De enige uitzondering is Zweden, maar dat verbaast niet in het licht van de bevindingen die in par. 2 van deze eindrapportage zijn neergelegd. De Zweedse rechter heeft niet de gewoonte tot toetsing van wetgeving aan de Grondwet, en zeker niet aan het EVRM, en heeft daarmee veel minder noodzaak om de uitspraken van het EHRM nauwgezet toe te passen. Ook is de bekendheid met wetsuitleg aan de hand van rechterlijke precedenten in Zweden niet heel groot. Niettemin probeert de Zweedse rechter wetgeving in overeenstemming met het EVRM uit te leggen, ook in privaatrechtelijke rechtsverhoudingen, en om uitspraken tegen Zweden op een goede manier te implementeren. Daarbij spelen de interpretaties van het EHRM een belangrijke rol.

In het algemeen tonen nationale rechters zich bereid om de uitleg van het EHRM te volgen en passen zij de EHRM-interpretaties zorgvuldig toe. Tegelijkertijd is zichtbaar dat in alle staten de EHRM-standaarden en -criteria worden ingepast binnen het eigen systeem; daarbij worden de regels soms iets bijgebogen en aangepast, ook al wordt de rechtspraak van het EHRM meestal zorgvuldig gevolgd. Slechts sporadisch is het zichtbaar dat een nationale rechter een EHRM-uitspraak werkelijk terzijde schuift omdat die onverenigbaar zou zijn met de nationale (constitutionele) uitgangspunten. Waar dat wel het geval is, resulteert dit meestal in een dialoog met het EHRM. Die dialoog leidt uiteindelijk vrijwel steeds tot een aanpassing van ofwel de EHRM-uitleg ofwel het nationale recht.

De betekenis en doorwerking van concrete EHRM-uitspraken in de nationale rechtspraak zijn hierdoor groot. De betekenis gaat echter niet zover dat, behalve materiële beoordelingsmaatstaven voor concrete gevalstypen, de nationale rechter ook de interpretatieve beginselen van het EHRM overneemt. Er zijn wel enkele gevallen van nationale rechters die deze beginselen, zoals die van evolutieve interpretatie, inroepen voor het rechtvaardigen van een eigen uitleg, maar die gevallen zijn uiterst zeldzaam. Wel roepen zij regelmatig de *margin of appreciation*-doctrine in, vooral met het doel om de constitutionele verhouding tussen rechter en wetgever nader te definiëren.

Ten slotte blijken nationale rechters hun bevoegdheden onder het EVRM en de nationale grondwetten slechts zelden op een activistische manier te benutten. De meeste nationale rechters hanteren expliciet of impliciet een 'mirror principle', wat betekent dat zij geen uitleg aan het EVRM zullen geven die verder gaat dan het EHRM vereist. De reden voor die benadering is veelal gelegen in respect voor de beperkte constitutionele taakstelling van de rechter: het is aan de wetgever om te bepalen of verdergaande bescherming moet worden geboden, niet aan de rechter. Opvallend is ook dat de meeste rechters zich in het algemeen terughoudend opstellen in hun toetsing aan het EVRM. Zij stellen nationale wetgeving en nationale bestuurshandelingen meestal alleen terzijde als die kennelijk in strijd zijn met een grondrecht. Daarbij komt de autoriteiten de nodige ruimte toe.

Het algemene beeld dat daarmee ontstaat is genuanceerd. Enerzijds laten nationale rechters zich leiden door het EHRM en passen zij zelfs vergaande EHRM-rechtspraak zorgvuldig toe, anderzijds blijven rechters kritisch en terughoudend. Te vergaande EHRM-uitspraken worden genuanceerd of terzijde gesteld, en de vrijheid van de nationale wetgever en bestuursorganen om gerechtvaardigde inbreuken te maken op grondrechten worden in het algemeen gerespecteerd.

4. Discussie over het EHRM en de EHRM-rechtspraak

4.1 Inleiding

In par. 1 is aangegeven dat er in Nederland de afgelopen jaren de nodige discussie is geweest over het EVRM en de uitspraken van het EVRM. Het EHRM zou zich volgens critici te activistisch opstellen en zou te gemakkelijk inbreuk maken op de nationale eigenheid van staten. Daardoor zouden soevereiniteit en democratische legitimatie in het gedrang komen, vooral ook nu de nationale rechter de

interpretatieve benadering van het EHRM moet overnemen en daardoor ook zelf erg actief is geworden bij het beschermen van grondrechten. Zoals in par. 1 is gebleken, zijn de Nederlandse discussies divers; zij hebben zowel betrekking op de rechtspraak van het EHRM zelf, als op de omgang daarmee door de nationale rechter en op de betekenis van de Nederlandse Grondwet.

Ook voor het Verenigd Koninkrijk is welbekend dat er de nodige discussie bestaat over het EHRM en zijn uitspraken, maar voor andere staten is dit onduidelijker. Onbekend is ook hoe in verschillende staten op deze discussies wordt gereageerd. Hebben deze discussies tot een andere houding geleid bij de nationale rechter jegens de uitspraken van het EHRM, of wellicht zelfs tot wetsvoorstellen tot aanpassing van de bevoegdheden van de nationale rechter tot toetsing? En hoe gaat het EHRM zelf om met nationale controverses en kritieken op zijn rechtspraak? Heeft deze geleid tot een andere houding van het EHRM, of tot een grotere terughoudendheid? In de verschillende rapporten is uitgebreid aandacht besteed aan deze vragen. Wij presenteren hierna een korte weergave van de belangrijkste bevindingen. Daarbij geven wij eerst een kort overzicht van de manier waarop het EHRM omgaat met nationale discussies en kritieken die betrekking hebben op zijn rechtspraak (par. 4.2). Vervolgens gaan wij in op het bestaan van dergelijke discussies in de zes onderzochte staten en bespreken wij de aard en impact daarvan (par. 4.3). Wij sluiten dit overzicht af met een kort resumé van de belangrijkste bevindingen (par. 4.4).

4.2 Omgang met nationale discussies en kritiek door het EHRM

Discussies en controverses over de EHRM-rechtspraak bestaan al heel lang. Zij worden onvermijdelijk gevonden, nu het EHRM zich inherent bezighoudt met kwesties die nationale gevoeligheden en beleidsprioriteiten kunnen raken.[119] Het uitgangspunt bij het EHRM is dat veel aandacht moet bestaan voor nationale discussies en dat kritiek waardevol is. Het is noodzakelijk en nuttig om te onderzoeken in hoeverre die kritiek terecht is en om respons vraagt. Tegelijkertijd moet kritiek niet worden uitvergroot en mag deze niet te gemakkelijk leiden tot grote wijzigingen.

Vanuit het Hof is erop gewezen dat vooral de laatste jaren de discussies in het Verenigd Koninkrijk en Nederland wel een wat ander karakter hebben gekregen. Daarbij is gewezen op het complexe en gelaagde karakter van deze discussies. Enerzijds is er concrete kritiek op bepaalde uitspraken van het EHRM. Dat is een vorm van kritiek waarmee het Hof goed kan omgaan en waarbij via dialoog met de staat een oplossing kan en moet worden gevonden. Anderzijds is een deel van de kritiek op het EHRM meer algemeen gericht op het wezen van het Hof. Deze kritiek is soms erg venijnig en scherp, zonder dat de precieze reden daarvoor gemakkelijk valt te duiden. Binnen het Hof worden voor deze kritiek vooral verklaringen gezocht in een meer algemeen anti-Europese houding in het Verenigd Koninkrijk en Nederland, in de economische crisis en in een houding ten gunste van democratische legitimatie en nationale soevereiniteit boven (internationale) rechterlijke oordeelsvorming. Het Hof lijkt het niet gemakkelijk te vinden om met dergelijke discussies om te gaan, juist vanwege het wat ongrijpbare karakter ervan, en ook omdat zij niet in dezelfde vorm en intensiteit zichtbaar zijn in de andere 45 staten van de Raad van Europa. Men vindt het onwenselijk en onevenwichtig om op basis van dergelijke discussies wijzigingen aan te brengen in het rechterlijk beleid. Een oplossing wordt binnen het Hof dan ook vooral gezocht in verbetering van de informele dialoog met kritische staten. Rechters stellen zich op als ambassadeurs en verschaffen uitleg in de staten over wat het Hof precies doet.

Tot concrete wijzigingen in de rechtspraak van het Hof hebben de discussies in het Verenigd Koninkrijk en Nederland volgens de gesprekspartners bij het Hof niet geleid. Weliswaar zijn er over het af-

[119] Zie voor een nadere weergave daarvan vooral par. 6.1 en 6.3.1 van het EHRM-rapport en de bijlage bij dat rapport (vragenlijst ten behoeve van gesprekken bij het EHRM).

gelopen decennium veel ontwikkelingen in de rechtspraak te zien, maar die verlopen langs lijnen van geleidelijkheid en houden vooral verband met het binnen het Hof gewenste rechterlijk beleid. Dat beleid wordt zelf uiteraard eerst en vooral bepaald door de aard van de voorgelegde zaken en de rechtsvragen die daarin besloten liggen. Wel hebben diverse gesprekspartners erop gewezen dat er een duidelijke tendens in de rechtspraak zichtbaar is in de richting van het verbeteren van de rechterlijke dialoog met nationale rechtscolleges. Het EHRM ziet nationale rechters in toenemende mate als partners in een gezamenlijk project om te komen tot een goede bescherming van fundamentele rechten. Het kan daaruit worden verklaard dat in de afgelopen jaren een duidelijke ontwikkeling zichtbaar is in de richting van procedurele toetsing en dialoog tussen het EHRM en nationale rechters. Beide ontwikkelingen zijn terug te zien in de voor het EHRM-rapport gemaakte jurisprudentie-analyse.[120] Daaruit blijkt dat het EHRM de laatste jaren nationale rechters prijst en waardeert als zij zorgvuldig te werk zijn gegaan en als zij het EVRM en de EHRM-uitspraken serieus in acht hebben genomen. In dat geval stelt het EHRM zich terughoudend op en respecteert het in het algemeen de uitkomst van de nationale gerechtelijke procedure. Is de nationale procedure lacuneus of bevat deze fouten, of voldoet de nationale rechtspraak niet aan de eisen van onafhankelijkheid en onpartijdigheid, dan is het Hof veel strenger. Het ziet de verbetering van nationale gerechtelijke procedures als een belangrijk vehikel om tot verbetering te komen van nationale grondrechtenbescherming. In het jurisprudentieonderzoek zijn daarnaast talrijke voorbeelden genoemd van dialoog door middel van rechterlijke uitspraken; daarop werd hiervoor, in par. 3.3, al gewezen. Daarbij reageert het Hof expliciet op uitspraken die op nationaal niveau zijn gedaan en waarin het Hof hetzij wordt gevraagd om wijziging van de rechtspraak, hetzij om bevestiging van een nationale jurisprudentielijn.[121] Het Hof reageert steeds serieus op dergelijke verzoeken door middel van zijn eigen uitspraken. Daarmee komt het regelmatig tegemoet aan concrete kritiek vanuit de nationale rechtspraak. De gesprekspartners bij het EHRM hebben aangegeven dat dit ook de enige juiste manier is voor een internationale rechter om om te gaan met nationale kritiek. Waar het voor een rechter als het Hof immers moeilijk is te reageren op algemene, diffuse en politieke discussies en controverses, is het goed mogelijk om tegemoet te komen aan concrete, in juridische termen geformuleerde bezwaren tegen bepaalde criteria of tegen een bepaalde EVRM-uitleg.

Het voorgaande betekent dat de discussies over de betekenis van de EHRM-rechtspraak in het Verenigd Koninkrijk en Nederland volgens de gespreksparners bij het EHRM niet of nauwelijks impact heeft op de eigen rechtspraak. Toch is ook wel aangegeven dat de rechters vatbaar zijn voor de beschuldiging dat het Hof te activistisch zou zijn en zich teveel met nationale rechtspraak zou bemoeien. Die beschuldiging is echter niet nieuw, zo is benadrukt. Er wordt al vele jaren geprobeerd om een goede balans te vinden tussen effectieve grondrechtenbescherming en respect voor nationale eigenheid. Uit het rechtspraakonderzoek blijkt dat dit inderdaad het geval is. Vooral in de afgelopen vijftien jaar (dus al ruim voor de discussies in het Verenigd Koninkrijk en Nederland opkwamen, en vooral na de toetreding van een groot aantal nieuwe staten en de scherpe toename van het aantal zaken), heeft het Hof nieuwe technieken ontwikkeld en bestaande technieken verfijnd om deze balans te vinden.[122] Bekend is natuurlijk de aloude *margin of appreciation*-doctrine, maar in het rapport is ook gewezen op technieken als die van rechterlijk minimalisme, het nalaten van het geven van een autonome interpretatie, het gebruik van consensusinterpretatie (soms ook om *geen* vooruitstrevende uitleg aan het verdrag te geven) en het toepassen van procedurele toetsingsvormen.

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[120] Zie vooral par. 5.2 en 6.2 van het EHRM-rapport.
[121] Zie par. 6.2 van het EHRM-rapport.
[122] Zie daarvoor vooral de analyse in par. 3, 4 en 5 van het EHRM-rapport, en zie par. 2.5, waarin de noodzaak om een balans te vinden is uitgewerkt.

Binnen het EHRM wordt toegegeven dat de werkelijk juiste balans moeilijk is te vinden en dat hiervoor een voortdurende zoektocht nodig is. Gehoopt wordt echter dat door de kwaliteit van de uitspraken en door de inzet van bestaande technieken, in samenhang met een concrete dialoog met de nationale rechters over uitspraken waarover controverse is ontstaan, zo goed mogelijk aan de kritiek tegemoet kan worden gekomen.

4.3 Bevindingen uit de landenrapporten

Aan de landenrapporteurs voor de zes onderzochte systemen is gevraagd om voor hun eigen rechtssysteem in beeld te brengen of er sprake is van discussie over de rechtspraak van het EHRM en de impact daarvan op de nationale rechtsorde. Als dergelijke discussies bestaan, is daarnaast gevraagd om iets te zeggen over het karakter, de oorsprong en de impact ervan. Voor Nederland zijn de discussies, behalve in het landenrapport, kort besproken in par. 1 van dit eerste deel van deze studie.[123] De discussies worden in Nederland vooral gevoerd binnen de politiek en de wetenschap (zij het vaak via ingezonden brieven in kranten). De media hebben het debat niet heel sterk opgepikt. Ook in de rechtspraak zijn discussies over het EHRM en de impact van de rechtspraak daarvan voor het nationale recht niet zichtbaar doorgedrongen. Weliswaar heeft de president van de Hoge Raad in de discussie enige stelling genomen, vooral ten gunste van het EHRM, maar in de uitspraken van hoogste rechters is geen grotere terughoudendheid of een andere rol van EHRM-uitspraken zichtbaar dan voorheen.

Het is welbekend dat er in het Verenigd Koninkrijk felle kritiek op het EHRM bestaat, vooral vanuit de conservatieve zijde van het huidige coalitiekabinet, aangevoerd door minister-president Cameron, en door de media.[124] Enkele Britse rechters uit het Supreme Court hebben zich al eerder kritisch getoond. De kritiek is in belangrijke mate ook aangevuurd in de media; vooral in de meer populaire kranten worden regelmatig aanvallen gedaan op de legitimiteit van het Hof. Het debat kent daarbij verschillende facetten. Enerzijds is er kritiek die is gericht op specifieke uitspraken van het EHRM die bijzonder ongewenst worden gevonden en in strijd worden geacht met nationale uitgangspunten en belangen. Te denken is aan de discussie over de uitspraken over het kiesrecht voor gedetineerden en de discussie over vrijlating van terrorismeverdachten die anders zouden moeten worden uitgezet naar staten waar zij een risico zouden lopen van foltering of een flagrant oneerlijk proces. Anderzijds is er, vooral in de media en in het algemeen zonder heel duidelijke fundering, kritiek op de samenstelling van het Hof en de onpartijdigheid en onafhankelijkheid van de rechters. Daarnaast zijn er klachten over het activisme van het Hof en de mate waarmee het via zijn uitspraken het bereik van het EVRM heeft laten uitdijen. Deze discussies lijken in het Verenigd Koninkrijk impact te kunnen hebben voor de juridische doorwerkingsmechanismen voor het EVRM. Critici zien de huidige Human Rights Act als een mechanisme dat rechters ertoe noodzaakt de EHRM-rechtspraak steeds te volgen, ook als dat in strijd is met de wens van het parlement en ook als die rechtspraak minder aanvaardbaar is. Er worden dan ook mogelijkheden onderzocht om een meer 'Britse' grondrechtencatalogus op te stellen. Dit plan is echter nog niet heel ver ontwikkeld en geniet ook geen brede steun. Daardoor is het niet helemaal duidelijk of en in welke mate de huidige rechterlijke toetsingsbevoegdheden daadwerkelijk zullen worden aangepast.

In de andere onderzochte rechtsstelsels is er ook wel discussie over het Hof, maar is die meer bescheiden van omvang. In België, Frankrijk, Zweden en Duitsland is het EHRM zelf in ieder geval niet

[123] Zie vooral het antwoord op de vragen 20 en 21 van de questionnaire voor het Nederlandse landenrapport.
[124] Zie hiervoor nader het antwoord op vraag 20 van de questionnaire in het Britse landenrapport.

of nauwelijks voorwerp van politieke debat.[125] In België heeft de extreemrechtse partij Vlaams Belang wel geprobeerd een politieke discussie te entameren over de impact van het EVRM, maar daarin is de partij niet geslaagd. Voor zover er in België felle kritiek is geleverd op de rechtspraak van het EHRM en de legitimiteit daarvan, beperkt deze zich tot een tweetal wetenschappers (waarvan één overigens wel ook president is van het constitutionele hof). Zij menen vooral dat het EHRM de grondrechtenbescherming te ver heeft doorgevoerd op het terrein van vreemdelingenrecht en sociale zekerheid. Deze kritiek is niet overgenomen door anderen en heeft ook geen vertaling gevonden in de media. Af en toe zijn er wel controverses over specifieke uitspraken van het EHRM, maar die leidt niet tot bredere discussies over de doorwerking van de EHRM-rechtspraak in het nationale recht.[126] Dit laatste geldt ook voor Zweden en Frankrijk. In Frankrijk geldt zelfs dat er nauwelijks openlijk kritiek wordt gegeven op individuele uitspraken van het EHRM. In Duitsland ontbreekt grootschalige en breed gedeelde kritiek op het EHRM eveneens. Waar in de politieke arena en de media kritisch wordt gesproken over het EHRM, betreft de discussie vooral enkele bijzonder controversiële uitspraken, zoals die over de vrijlating van mensen die zijn veroordeeld wegens verkrachting, moord etc.; daarbij is er de angst dat de rechtspraak zal leiden tot recidive en gevaarlijke situaties. Vooralsnog heeft dit echter niet geleid tot concrete pogingen om de doorwerking van de EHRM-rechtspraak te beperken, integendeel: het Duitse constitutionele hof heeft de betreffende controversiële uitspraken uiteindelijk overgenomen en de politiek heeft zich daarbij neergelegd. Wel hebben enkele toonaangevende Duitse wetenschappers (veelal voormalige hoge rechters) voorstellen gedaan om de betekenis van het EHRM te beperken, zoals het volledig overlaten van belangenafwegingen aan nationale autoriteiten, het beperken van de competentie van het EHRM tot constitutionele en richtinggevende beslissingen, en het creëren van een soort presumptie van EVRM-conformiteit voor bepaalde staten. Hoewel deze voorstellen academisch interessant worden gevonden, zijn zij blijkens het rapport niet opgepakt door de politiek. Er is geen enkele indicatie dat invoering ervan daadwerkelijk wordt overwogen.

4.4 Conclusie

Als wordt gekeken naar de zes onderzochte staten, blijkt dat brede en uitgesproken discussies over de impact van de EHRM-rechtspraak vooral zichtbaar zijn in het Verenigd Koninkrijk en, zij het iets minder fel en anders getoonzet, in Nederland. Nederland en het Verenigd Koninkrijk hebben daarbij gemeenschappelijk dat de discussies een politieke vertaling hebben gekregen, al is die in het Verenigd Koninkrijk het meest vergaand en concreet. In de andere onderzochte staten is de kritiek op het EHRM veel beperkter en komt deze niet of nauwelijks in de politieke arena of in de media tot uitdrukking. Kritiek betreft hier veelal individuele, controversiële uitspraken, waarbij de vraag wordt opgeworpen hoe daarmee moet worden omgegaan. Geprobeerd is wel (vooral in Duitsland en België) om een bredere discussie over de impact van het EHRM en de redelijkheid van diens benadering te entameren, voornamelijk door enkele wetenschappers en (oud-) rechters. Deze discussie kent in Duitsland noch in België echter een werkelijke vertaling naar de politiek en er wordt in de media weinig aandacht aan besteed.

De omgang met de debatten over het EHRM verschilt. In het Verenigd Koninkrijk en Nederland zijn daadwerkelijk stappen gezet om een beleidsmatige of juridische vertaling te geven aan de daar gevoerde discussies, bijvoorbeeld door de keuze voor een specifieke inzet bij intergouvernementele toppen over de toekomst van het EHRM, en door wetsvoorstellen om de rol van de nationale rechter bij de implementatie van het EVRM te beperken. In de andere onderzochte staten beperkt de praktische vertaling van (academische of maatschappelijke) kritiek zich tot de rechterlijke sfeer en tot con-

[125] Zie de antwoorden op vraag 20 van de questionnaire in de respectieve landenrapporten.
[126] Zie over de omgang met dergelijke controversiële uitspraken par. 3.3.4 van dit rapport.

crete gevalen. Daar zullen rechters bijvoorbeeld terughoudend omspringen met EHRM-precedenten die bezwaarlijk worden gevonden, zoals hiervoor in par. 3.3.4 al aan bod kwam.

Het EHRM lijkt vooral goed om te kunnen gaan met de meer concrete en juridisch vertaalbare vorm van kritiek op individuele rechterlijke uitspraken. Als rechters welbewust bezwaren uiten tegen bepaalde EHRM-interpretaties, en vooral als zij dat expliciet en goed gemotiveerd doen, ziet het Hof hierin juist meerwaarde. De nationale uitspraken vormen dan de basis voor een dialoog tussen rechters, waarbij controverses en kritiekpunten op een juridische en voor het Hof goed hanteerbare manier worden geformuleerd. Brede, diffuse en relatief vage discussies over activisme of bescherming van nationale soevereiniteit zijn voor het Hof lastiger, omdat het daarop in zijn uitspraken niet goed kan reageren; een juridische vertaling van politiek of ideologisch getinte debatten is niet gemakkelijk te maken. Het Hof reageert op deze discussies vooral via gesprekken met nationale hoogste rechters (en soms politici) en door het inzetten van rechters om de werkwijze beter uit te leggen. Daarbij wijst het Hof er telkenmale op dat het via zijn rechtspraakmethoden een goede balans beoogt te vinden tussen bescherming van fundamentele rechten en respect voor nationale diversiteit.

Uit het rechtspraakonderzoek is gebleken dat het Hof over verschillende methoden beschikt om een oplossing te vinden in de inherente spanningsverhouding tussen nationale eigenheid en diversiteit enerzijds, en de wens tot een goed niveau van grondrechtenbescherming anderzijds. Het feit dat er in de onderzochte staten in het algemeen relatief weinig kritiek wordt geuit op het Hof, kan er wellicht op wijzen dat het Hof in algemene zin vrij goed slaagt in het vinden van een balans. Het oordeel daarover is echter ook een kwestie van waardering: waar sommigen vinden dat het Hof deze mechanismen zeker nog niet optimaal benut, en meer respect zou moeten hebben voor nationale eigenheid, vinden anderen dat het Hof soms juist meer rechtsbescherming zou moeten bieden. Een puur juridische en objectieve discussie, waarin normatieve, politieke en ideologische opvattingen geen rol spelen, is over dit onderwerp moeilijk te voeren, en een ideaalmodel voor het Hof is nauwelijks te geven.

5. Toegankelijkheid en kennis van EHRM-uitspraken

5.1 Inleiding

Om ervoor te kunnen zorgen dat het EVRM en de EHRM-uitspraken op een goede manier worden geïmplementeerd door de nationale rechter, is het uiteraard belangrijk dat nationale rechters voldoende bekend zijn met het EVRM en met de rechtspraak daarover. In dat verband is aan de landenrapporteurs een aantal vragen voorgelegd met betrekking tot de opleiding van rechters op het punt van het EVRM, de beschikbaarheid van EHRM-uitspraken en de toegankelijkheid van de EHRM-rechtspraak voor rechters. Andersom is het voor een goede dialoog tussen het EHRM en nationale rechters belangrijk dat het EHRM toegang kan hebben tot nationale uitspraken. Op dit punt is de landenrapporteurs gevraagd om na te gaan in hoeverre hun nationale uitspraken voor het EHRM toegankelijk zijn in een van de officiële werktalen van dit Hof, het Frans en het Engels. In deze paragraaf doen wij hiervan kort verslag.

5.2 Kennis van het EVRM

In alle onderzochte stelsels maakt het verwerven van kennis en begrip van het EVRM vast onderdeel uit van de rechtenstudie.[127] Het niveau en de intensiteit van het onderwijs verschillen echter nogal. In Duitsland wordt bijvoorbeeld geklaagd over het feit dat het EVRM slechts een klein onderdeel vormt van vakken over staatsrecht en er geen afzonderlijke aandacht in het curriculum aan wordt

[127] Zie de antwoorden op vraag 22.a van de questionnaire in de verschillende landenrapporten.

gegeven. In Nederland is het EVRM in de meeste rechtenfaculteiten een afzonderlijk te bestuderen onderwerp, maar worden aspecten van EVRM-recht ook geïntegreerd behandeld in andere vakken, zoals familierecht, strafrecht of vreemdelingenrecht.

In de meeste stelsels geldt daarnaast dat in de opleiding tot rechter bijzondere aandacht wordt gegeven aan het EVRM, zoals in België, Frankrijk en Zweden. In de Nederlandse raio-opleiding wordt momenteel uitsluitend een geïntegreerde benadering gevolgd, waarbij aandacht aan het EVRM en de EHRM-rechtspraak wordt gegeven in vakken als straf- en strafprocesrecht, familierecht etc. Wel zijn er speciale cursussen voor zittende rechters en worden er diverse post-academische en in-house cursussen aangeboden door universiteiten. In het Verenigd Koninkrijk lijkt de opleiding voor rechters het sterkst te zijn ontwikkeld – daar worden via een omvangrijk project diverse gespecialiseerde modules over het EVRM aangeboden.

5.3 Toegankelijkheid van EHRM-uitspraken

5.3.1 Publicatie en toegangsmogelijkheden

Gelet op het grote belang van de uitspraken van het EHRM, zoals hiervoor besproken in par. 3 en 4, is het essentieel dat nationale rechters goede toegang hebben tot deze uitspraken. Die toegang biedt het EHRM uiteraard zelf, via zijn databank HUDOC (waarin alle uitspraken integraal worden gepubliceerd), maar ook via persberichten en 'case-law information notes'. Daarnaast heeft het EHRM vooral in de afgelopen jaren flink geïnvesteerd in de ontwikkeling van 'practice guides', 'reports' en 'factsheets', waarin per onderwerp korte overzichten worden gegeven van de belangrijkste rechtspraak op bepaalde terreinen. Deze factsheets zijn niet alleen beschikbaar in het Engels en Frans, de twee officiële werktalen van het EHRM, maar deels ook in het Duits, Pools, Russisch en Turks.[128]

Op nationaal niveau worden daaraan nog allerlei andere bronnen toegevoegd.[129] Vooral Nederland heeft een rijke collectie van mogelijkheden voor rechters om gemakkelijk toegang te krijgen tot selecties van uitspraken. Relevante uitspraken worden standaard in de belangrijkste jurisprudentie-tijdschriften gepubliceerd, veelal voorzien van (Nederlandstalige) samenvattingen en annotaties. Er zijn veel gespecialiseerde vakbladen die voor het eigen terrein relevante uitspraken publiceren, maar ook algemene tijdschriften, zoals het Nederlands Juristenblad, de Administratiefrechtelijke Beslissingen en de Nederlandse Jurisprudentie besteden van oudsher veel aandacht aan EHRM-uitspraken. Daarnaast zijn er diverse nieuwsbrieven, ook speciaal bedoeld voor de rechterlijke macht, die rechters kunnen helpen om hun weg te vinden in het oerwoud van EHRM-uitspraken en die hen snel op de hoogte brengen van relevante nieuwe uitspraken.

In België en Frankrijk bestaat er een soortgelijk systeem van publicatie via juridische tijdschriften en jurisprudentiebladen. In Frankrijk wordt de toegankelijkheid nog vergroot door publicatie van overzichten van belangrijke rechtspraak in een databank van het *Cour de Cassation* en de beroepshoven. Hoewel rechters soms nog klagen over de moeilijke vindbaarheid van relevante precedenten, hebben zij hierdoor in het algemeen goed toegang tot de belangrijkste uitspraken en komen zij hiervan snel op de hoogte. In Duitsland bestaat er een automatisch notificatiesysteem waarbij het ministerie van justitie uitspraken tegen Duitsland meteen doorstuurt naar rechters voor wie deze zaak relevant is. In Zweden worden uitspraken tegen Zweden zelf meteen vermeld op een website van het ministerie van buitenlandse zaken, net als samenvattingen van belangrijke uitspraken tegen andere staten.

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[128] Zie voor de factsheets www.echr.coe.int/ECHR/EN/Header/Press/Information+sheets/Factsheets/ (laatstelijk geraadpleegd 6 maart 2013). Andere informatiebronnen zijn te vinden via www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/.

[129] Zie nader de antwoorden op vraag 22b van de questionnaire in de verschillende landenrapporten.

Gelet op de rijke publicatiecultuur en de grote toegankelijkheid van de EHRM-rechtspraak, is het niet verbazend dat in de genoemde stelsels frequent verwezen wordt naar EHRM-uitspraken en dat rechters zelfs de meest actuele uitspraken in hun eigen vonnissen en arresten kunnen betrekken.

5.3.2 Taal

Het lijkt erop dat de beschikbaarheid van de uitspraken in het Engels en Frans niet direct een probleem vormt voor de nationale rechters die ermee moeten werken.[130] Dit geldt uiteraard voor Frankrijk, het Verenigd Koninkrijk en tot op zekere hoogte ook België, waar men een van de officiële talen van het Hof als landstaal heeft. Wel moet daarbij worden opgemerkt dat het EHRM in toenemende mate uitspraken slechts in één van beide talen publiceert. Alleen uitspraken van de Grote Kamer (die dan ook wel het meest belangrijk zijn) zijn altijd tweetalig. Voor andere uitspraken kan later nog in een vertaling in de andere werktaal worden voorzien als blijkt dat de uitspraak erg belangrijk is, maar hierbij treedt meestal veel vertraging op. Uitspraken die niet in de eigen taal zijn gedaan (dus toch ongeveer de helft van het totaal), worden in Frankrijk en het Verenigd Koninkrijk minder goed gelezen en zijn ook minder bekend. België neemt hierbij een tussenpositie in.

In Nederland, Duitsland en Zweden is een vertaalslag altijd nodig. Weliswaar heeft het EHRM een project ondernomen, samen met het Human Rights Trust Fund, om uitspraken toegankelijk te maken in andere talen dan het Engels en Frans, maar van stelselmatige vertalingen is zeker geen sprake. Het Hof verwijst op zijn website vooral naar vertalingen die beschikbaar zijn gemaakt door andere organisaties dan het Hof zelf; die zijn echter niet authentiek en daardoor niet allemaal betrouwbaar.[131]

In Nederland, Duitsland en Zweden lijken uitspraken meestal in de originele vorm te worden gelezen (dus niet in vertaling), maar het lijkt erop dat men in deze drie staten het Engels veel beter beheerst dan het Frans. Ook hier worden de Engelstalige uitspraken dus gemakkelijker en beter gelezen dan de Franstalige. Niettemin geven de rapporteurs voor deze staten aan dat het lezen van uitspraken in een andere dan de eigen taal steeds een zekere belemmering zal vormen; de bereidheid om dit te doen is minder groot en ook het begrip van de uitspraken kan beperkter zijn dan als de uitspraken zijn vertaald. In alle drie de genoemde staten zijn er dan ook voorzieningen aanwezig om de toegankelijkheid in de eigen taal van alle uitspraken te vergroten. In Duitsland worden EHRM-uitspraken tegen Duitsland meestal integraal vertaald. Van belangrijke uitspraken tegen andere staten zijn Duitse vertalingen beschikbaar in een door wetenschappers beheerde database. In Zweden en Nederland is er geen traditie om te voorzien in integrale vertalingen, maar worden er wel samenvattingen in de eigen taal gemaakt, hetzij officieel (Zweden, Duitsland), hetzij door wetenschappelijke tijdschriftredacties (Nederland).

5.4 Beschikbaarheid van nationale uitspraken in het Engels en Frans

Waar het voor nationale rechters belangrijk is dat zij de uitspraken van het EHRM goed kunnen begrijpen, is het voor het EHRM belangrijk om goede toegang te hebben tot nationale rechterlijke uitspraken. Uit het EHRM-onderzoek is gebleken dat het EHRM zelf grote waarde hecht aan nationale hoogste uitspraken en bereid is om daarin een uitnodiging tot dialoog te zien. De respondenten bij het EHRM hebben echter ook aangegeven dat zo'n dialoog alleen goed mogelijk is als de nationale rechters in hun eigen uitspraken voldoende duidelijk aangeven tegen welke uitspraak of interpretatie zij bezwaar hebben en welke redenen zij daarvoor hebben, of als zij in hun uitspraak een duidelijke vraag stellen met betrekking tot bevestiging van de eigen EVRM-uitleg of die van het EHRM. Stelt

[130] Zie de beantwoording van vraag 22c en 22d van de questionnaire in de verschillende landenrapporten.
[131] Zie www.echr.coe.int/ECHR/EN/HUDOC/Translations/. Bij het zoeken in HUDOC naar uitspraken laten de zoekresultaten meteen ook de beschikbare vertalingen zien van zaken, ook als die beschikbaar zijn gesteld door derde partijen.

dit al eisen aan de nationale motivering, dan geldt daarnaast dat dit het nog extra belangrijk maakt dat het EHRM goede toegang heeft tot nationale uitspraken.

Uiteraard krijgt het EHRM standaard toegang tot vertalingen van nationale uitspraken in de zaken die aan het Hof zijn voorgelegd, als onderdeel van de processtukken. Verder zijn voor het EHRM uitspraken in het Engels en Frans uiteraard gemakkelijk toegankelijk. Voor Frankrijk, België en het Verenigd Koninkrijk geldt bovendien dat hun uitspraken goed digitaal zijn ontsloten, zodat de medewerkers van het EHRM ze gemakkelijk kunnen raadplegen. Voor deze staten is het daardoor relatief gemakkelijk om een dialoog met het EHRM te starten.

De vraag is dan vooral in hoeverre het EHRM zich, buiten concrete procedures om, op de hoogte kan stellen van rechterlijke opvattingen en ontwikkelingen in andere staten dan Frankrijk, België en het Verenigd Koninkrijk. De mogelijkheden daartoe blijken voor de drie onderzochte staten beperkt te zijn.[132] In Duitsland worden rechterlijke uitspraken zeker niet standaard vertaald in het Engels of Frans. Een Engelse vertaling wordt meestal wel gemaakt bij belangrijke uitspraken van het federale constitutionele hof. De vertalingen van uitspraken van dit hof zijn bovendien gemakkelijk op zijn website terug te vinden. Daarnaast zijn vertalingen van een selectie van Duitse uitspraken verkrijgbaar via particuliere, wetenschappelijke initiatieven. In Nederland en Zweden is er geen traditie van officiële vertalingen van rechterlijke uitspraken in het Engels of het Frans. Wel is er ook hier deelname aan wetenschappelijke initiatieven die streven naar betere ontsluiting van nationale rechtspraak in het Engels. De uitspraken zijn in de eigen taal in de alle genoemde landen steeds goed digitaal beschikbaar. De beschikbaarheid van Engelse vertalingen is vaak veel beperkter, juist ook doordat de vertalingen vaak in het kader van particuliere initiatieven worden gemaakt en 'open access' nog niet algemeen is aanvaard.

5.5 Conclusie

In basiskennis van het EVRM wordt in alle onderzochte staten voorzien door de rechtenstudie en (in de meeste gevallen) door specifieke of geïntegreerde modules in de rechtersopleiding. In alle onderzochte staten zijn uitspraken van het EHRM gemakkelijk beschikbaar, zeker in de originele talen (Frans en Engels). Er wordt veel aandacht aan de EHRM-rechtspraak besteed in vakbladen en nieuwsbrieven, hetzij commercieel uitgegeven, hetzij uitgeven vanwege de overheid. De grote toegankelijkheid van de rechtspraak kan verklaren waarom in alle onderzochte stelsels (behalve in Zweden, maar dat heeft andere oorzaken, als besproken in par. 3.3.3) zo frequent naar EHRM-uitspraken wordt verwezen. Tegelijkertijd geldt dat de verwijzingen selectief kunnen zijn. In staten waar de kennis van het Engels in het algemeen beter is dan die van het Frans, zullen Franstalige uitspraken niet vaak worden gelezen en geciteerd, en andersom. Ook lijkt het erop dat Duitse, Nederlandse en Zweedse rechters meestal liever gebruik maken van beschikbare bronnen (vooral samenvattingen) in de eigen taal, dan dat zij uitspraken integraal in het Engels of in het Frans lezen. De toegankelijkheid van de EHRM-rechtspraak zou dan ook kunnen worden verbeterd als vertalingen in de eigen taal meer stelselmatig beschikbaar zouden zijn, of toch in ieder geval als alle uitspraken zowel in het Frans als in het Engels zouden worden vertaald.

Andersom zijn voor het Hof nationale uitspraken uit Frankrijk, België of het Verenigd Koninkrijk gemakkelijker leesbaar dan uitspraken uit Duitsland, Zweden en Nederland. Terwijl in Duitsland belangrijke constitutionele uitspraken nog wel in het Engels worden vertaald, is dat in Zweden en Nederland bepaald geen gangbare praktijk. Zou de wens bestaan om de dialoog te vergroten door betere toegang te bieden tot nationale uitspraken, waaruit bijvoorbeeld kan blijken hoe bepaalde

[132] Zie hiervoor de beantwoording van vraag 23 van de questionnaire in de landenrapporten.

EHRM-uitspraken zijn ontvangen, dan zou frequentere vertaling van belangrijke nationale uitspraken een goed begin kunnen zijn.

6. Slotsom

De invloed van het EVRM op de Nederlandse rechtsorde is groot, zo stelden wij in het begin van deze eindrapportage al vast. De onderhavige studie is er vooral op gericht geweest te zoeken naar verklaringen hiervoor in het nationale constitutionele recht en in de rechtspraak van het EHRM. Die zoektocht vond zijn basis in twee veronderstellingen die het Nederlandse debat over de betekenis van de EVRM-rechtspraak voor het Nederlandse recht domineren. Enerzijds wordt vaak verondersteld dat de traditionele openheid van Nederland voor het internationale recht verantwoordelijk is voor de sterke doorwerking, in combinatie met het verbod om formele wetten te toetsen aan de Grondwet. Anderzijds wordt een verklaring gezocht in de activistische houding van het EHRM. Door de sterk evolutieve interpretatie van het EVRM is de reikwijdte van het EVRM sterk uitgedijd en is de invloed van de Straatsburgse rechtspraak in absolute zin steeds groter geworden. In de wisselwerking met de constitutionele kenmerken van het Nederlandse systeem, zo is vervolgens de aanname, betekent dit dat de vergaande EHRM-rechtspraak heel direct en heel indringend in de Nederlandse rechtsorde doorwerkt.

In het licht van de bevindingen van deze studie moeten deze veronderstellingen in belangrijke mate worden genuanceerd en bijgesteld. Een eerste reden daarvoor is dat de aard van het constitutionele systeem voor doorwerking van internationaal recht via nationale rechtspraak veel minder relevantie blijkt te hebben dan vaak wordt aangenomen. In alle onderzochte staten is de betekenis van het EVRM en de EHRM-rechtspraak voor de nationale rechtspraak bijzonder groot. Of het systeem nu overwegend monistisch is, zoals in Nederland, Frankrijk, België en in toenemende mate ook Duitsland, of overwegend dualistisch, zoals in het Verenigd Koninkrijk en Zweden: nationale rechters worden steeds vaker geconfronteerd met beroepen op het EVRM en zij passen het EVRM, zoals uitgelegd door het EHRM, steeds vaker toe. De enige uitzondering hierop lijkt Zweden te zijn. Daar bestaat in meer algemene zin nauwelijks een traditie van rechterlijke toetsing van wetgeving, noch aan het EVRM, noch aan de eigen Grondwet. De onaantastbaarheid van wetgeving is in Zweden diep in de constitutionele cultuur geworteld en kent een lange geschiedenis. Zelfs voor Zweden geldt echter dat er geleidelijk aan veranderingen zichtbaar zijn. In 2011 is de toetsing van formele wetgeving aan de grondwet en het EVRM vergemakkelijkt, en een enkele maal wordt een EVRM-bepaling of een EHRM-uitspraak ingeroepen.

Opmerkelijk is ook dat juist in staten die een meer dualistische traditie hebben, en die van oudsher hun eigen constitutionele rechten en beginselen voorop stellen, de nationale rechters de EHRM-rechtspraak nauwgezet volgen en deze in hun eigen rechtspraak verwerken. Het vermoeden dat in monistische staten, zoals Nederland, Frankrijk en België, sprake is van meer 'slaafse' navolging van Straatsburg dan in deze staten, blijkt daarbij bepaald niet correct. Inderdaad geldt dat in een staat als het Verenigd Koninkrijk de bevoegdheid van de rechter tot toepassing van het EVRM is begrensd. Hij kan wettelijke bepalingen bijvoorbeeld niet buiten toepassing laten wegens strijd met het EVRM. Ook de rechtspraakcultuur is op zichzelf terughoudend. Een Britse rechter zal geen verdergaande bescherming aan EVRM-rechten bieden dan strikt volgens de EHRM-rechtspraak is vereist, en hij is zelfs bereid EHRM-uitspraken terzijde te stellen als die radicaal ingaan tegen nationale constitutionele waarden. Ook de Duitse rechter zal de eigen grondwettelijke bepalingen laten prevaleren als EHRM-uitspraken daarmee evident in strijd zijn. Dergelijke begrenzingen nemen echter niet weg dat in zowel Duitsland als het Verenigd Koninkrijk sprake is van vergaand EVRM-conforme interpretaties. De uitspraken van het EHRM hebben de nationale doctrines op het terrein van grondrechtenbescherming sterk beïnvloed en er bestaat een belangrijke veronderstelling van 'Europarechtfreundlichkeit': de EHRM-interpretaties worden zorgvuldig gevolgd en toegepast, tenzij sprake is van een

zeer uitzonderlijke situatie van aperte en problematische strijdigheid met kernbeginselen van het eigen nationale recht.

Daar staat tegenover dat in Nederland de rechter naar de letter van de Grondwet gehouden is om nationaal recht buiten toepassing te laten als dit in strijd is met het EVRM en de daaraan door het EHRM gegeven uitleg. Ogenschijnlijk is de impact van het EVRM (en de EHRM-rechtspraak) daardoor veel directer en groter dan het geval is in het Verenigd Koninkrijk en Duitsland. Grondige bestudering van de rechtspraak laat echter zien dat de Nederlandse rechter tal van subtiele instrumenten heeft ontwikkeld om de doorwerking van het EVRM te verzachten. Deze instrumenten houden in sterke mate verband met de taakstelling die de Nederlandse rechter voor zichzelf ziet weggelegd in de constitutionele orde. Daarbij is natuurlijk eerst en vooral te denken aan het 'abstineren', dat wil zeggen dat de rechter het soms aan de wetgever overlaat om te bepalen hoe een strijdigheid van nationaal recht met internationaal recht moet worden weggenomen. Verder zal de Nederlandse rechter geen bevel aan de wetgever geven om een strijdigheid weg te nemen door middel van het introduceren van bepaalde wetgeving. Evenmin zal de Nederlandse rechter zelfstandig verdergaande bescherming geven aan EVRM-rechten dan vereist door de EHRM-rechtspraak. Verder kiest de rechter veel eerder voor EVRM-conforme interpretatie dan voor het volledig buiten toepassing laten van een regeling. Daarbij is interessant dat 'EVRM-conforme interpretatie' als zodanig ook weer 'nationaal recht conform' zal zijn. De Nederlandse rechter (overigens net als andere in deze studie onderzochte rechters, zoals de Belgische en de Duitse) zal EHRM-doctrines, criteria en factoren zodanig bijbuigen en kneden dat deze goed aansluiten bij het nationale recht. Blijkt dit echt niet mogelijk te zijn, en is een EVRM-uitleg echt niet inpasbaar in het eigen recht, dan zal de Nederlandse rechter soms zelfs ervan afzien om deze uitleg toe te passen.

Dit betekent dat de Nederlandse rechter al veel mechanismen toepast die in traditioneel meer dualistische staten (Duitsland, het Verenigd Koninkrijk) eveneens bestaan. De landenrapporten die zijn opgesteld voor deze studie laten bovendien in meer algemene zin een sterke convergentie zien waar het gaat om de toepassing van het EVRM door de nationale rechter, met uitzondering van Zweden. Wellicht is dit de verklaring dat uiteindelijk de praktische betekenis van de EHRM-rechtspraak voor de nationale rechtspraak zo sterk vergelijkbaar is.

De tweede veelgenoemde veronderstelling met betrekking tot de doorwerking van het EVRM in het nationale recht is, zoals hiervoor al gezegd, gelegen in de rechtspraak van het EHRM zelf, die steeds breder en steeds indringender is geworden. Uit deze studie is gebleken dat deze verklaring tot op zekere hoogte houdbaar is. Het EHRM heeft in toenemende mate verplichtingen opgelegd aan de nationale rechters tot EVRM-conforme toepassing en interpretatie van nationaal recht. Bovendien is de reikwijdte van de EVRM-rechten in de loop van de jaren sterk uitgebreid. Toch is uit deze studie naar voren gekomen dat ook op dit punt nuancering nodig is. De uitbreiding en verdieping van de verplichtingen voor de nationale rechters zijn gepaard gegaan met een versterking van de idee van samenwerking en dialoog tussen nationale rechters en het EHRM. Het EHRM nodigt nationale rechters uit om een eigen uitleg aan het EVRM te geven, zelfs als die afwijkt van die gegeven in de EHRM-rechtspraak, nu op die manier tot rechtsontwikkeling en tot een goed passend niveau van grondrechtenbescherming kan worden gekomen. Bovendien heeft het EHRM tal van mechanismen ontwikkeld waardoor het de eigenheid van het nationale recht kan respecteren en juist geen diepgaande inbreuk hoeft te maken op het nationale recht. Veel interpretatiemethoden vertrekken bijvoorbeeld vanuit respect voor het nationale recht en voor de kwaliteit van nationale procedures, en het Hof waakt er meestal voor om al te zware en brede morele oordelen te geven. Daarmee eist het Hof enerzijds dat zijn doctrines en criteria worden ingepast in het nationale recht, maar laat het daarvoor anderzijds ook veel ruimte en accepteert het dat soms wordt gekozen voor een uitkomst die afwijkt van wat het zelf zou hebben geoordeeld. Uiteindelijk blijkt voor het EHRM het enige dat telt dat op nationaal niveau een redelijk niveau van grondrechtenbescherming wordt geboden; de precieze manier waarop dat gebeurt is minder relevant.

Het voorgaande betekent dat in alle onderzochte landen constitutionele mechanismen aanwezig zijn die het rechters mogelijk maken om de doorwerking van het EVRM naar hun hand te zetten en hun eigen taakstelling goed af te bakenen van die van andere staatsmachten. Het EHRM laat daarvoor ruimte en stimuleert zelfs dat nationale rechters actief zoeken naar de beste vorm van grondrechtenbescherming binnen hun eigen systeem. Als dat allemaal zo is, is het wellicht des te opmerkelijker dat er (vooral in Nederland en het Verenigd Koninkrijk) zoveel discussie bestaat over de doorwerking van de EHRM-rechtspraak in het nationale recht. Een eerste belangrijke observatie op dit punt is dat scherpe en brede kritiek op de EHRM-rechtspraak nauwelijks zichtbaar is in België, Duitsland, Frankrijk en Zweden. Weliswaar wordt daar soms wel kritiek geleverd op het vermeende activisme van het EHRM of op inbreuken op de nationale sovereiniteit of de wens van de democratisch gelegitimeerde wetgever, maar deze kritiek is niet breed ondersteund en heeft ook nauwelijks ingang gevonden in politieke discussies. De kritiek betreft bovendien vooral individuele uitspraken van het EHRM.

Deze relatieve onverschilligheid kan voor Zweden misschien nog worden verklaard vanuit het constitutionele systeem, nu de doorwerking van de rechtspraak van het EHRM daar traditioneel erg beperkt is en men zich over de impact van de EHRM-rechtspraak nauwelijks hoeft te bekommeren. In Duitsland, België en Frankrijk is er echter wel degelijk een stevige doorwerking, die wordt gefaciliteerd (maar ook begrensd) door nationale constitutionele mechanismen. Toch wordt de legitimiteit van het EHRM in deze staten nauwelijks betwist. Dit maakt het onwaarschijnlijk dat discussies over de EHRM-rechtspraak in algemene zin verband houden met de mate van doorwerking in de nationale rechtspraak, in het bijzonder met het ontbreken van constitutionele instrumenten om die doorwerking tegen te houden. Minstens zo lastig is het om de nationale discussies te verklaren vanuit de sterk toegenomen bemoeienis van het EHRM. Die bemoeienis is voor Nederland en het Verenigd Koninkrijk immers niet groter dan voor de andere vier onderzochte staten.

Dit maakt het waarschijnlijk dat een verklaring voor de kritiek op het EHRM moet worden gezocht in de twee kritische staten zelf. Deels kan zo'n verklaring worden gevonden in de politieke context of in de algemene houding binnen de staat ten opzichte van Europeanisering en 'verrechterlijking'. Het doel van deze studie was echter niet om dergelijke niet-juridische en niet-constitutionele verklaringen te vinden; dat zou eerder een rechtssociologisch en/of politicologisch onderzoek vergen. Een andere mogelijke verklaring kan worden gevonden in een opvallende overeenkomst tussen Nederland en het Verenigd Koninkrijk, namelijk het ontbreken van een mogelijkheid tot constitutionele toetsing. In de andere vier bestudeerde staten bestaat zo'n mogelijkheid wel. In die staten worden het EVRM en de EHRM-rechtspraak vaak ingebed in constitutionele normen, of toetst de rechter via constitutionele normen (dus indirect) aan het EVRM. Dit levert feitelijk en juridisch geen ander resultaat op, in die zin dat het voor de uitkomst van een concreet voorgelegde zaak niet veel verschil zal maken of rechtstreeks het EVRM wordt toegepast, of een nationale constitutionele bepaling volledig in overeenstemming met het EVRM wordt uitgelegd. Het is echter niet ondenkbaar dat er een andere gevoelswaarde is als grondrechten vooral via de eigen Grondwet en via constitutionele toetsing hun ingang vinden. In het Verenigd Koninkrijk en in Nederland is het EVRM duidelijk een substituut-grondrechtencatalogus; evenzo duidelijk is dat de betekenis daarvan sterk door een supranationaal hof wordt bepaald. Ook al zijn er allerlei mogelijkheden om de Straatsburgse rechtspraak naar de nationale hand te zetten, dit creëert gemakkelijk het beeld van vergaande supranationale bemoeienis.

In hoeverre de beeldvorming ten aanzien van de indringendheid van het EVRM en de EHRM-rechtspraak echt hierdoor wordt beïnvloed, en in hoeverre het bestaan van een mogelijkheid van constitutionele toetsing helpt om acceptatie van doorwerking van internationale rechtspraak te vergroten is echter primair een rechtssociologische vraag. Op basis van deze juridische en rechtsvergelijkende studie kunnen wij daarop geen stellig antwoord geven; verdergaand rechtssociologisch en politicologisch onderzoek zou daarvoor zijn vereist. Zou dit inderdaad een verklaring kunnen vormen, dan is een interessante optie om de aanvaardbaarheid van EHRM-rechtspraak te vergroten

echter, paradoxaal genoeg, gelegen in het creëren van een bevoegdheid tot constitutionele toetsing. Dit zou ook voor de Nederlandse rechter de mogelijkheid creëren om EHRM-rechtspraak meer expliciet te internaliseren en de Grondwet te gebruiken als buffer tussen het EVRM en het nationale recht.

Tot slot merken wij op dat kleine, feitelijke aanpassingen in de sfeer van nationale rechterlijke omgang met het EVRM grote gevolgen kunnen hebben. Wij hebben vastgesteld dat het EHRM zich openstelt voor inhoudelijke input vanuit de nationale rechterlijke macht en dat die input kan leiden tot een effectieve dialoog tussen rechters. Landen waarvan de hoogste rechters actief inzetten op een dergelijke dialoog, zoals het Verenigd Koninkrijk en Duitsland, blijken een aanzienlijke invloed te kunnen hebben op de rechtsontwikkeling bij het EHRM. Het valt daarbij op dat deze landen een aantal zaken gemeenschappelijk hebben. Rechters spreken zich in hun uitspraken expliciet uit over EVRM-vraagstukken en over hun lezing en waardering van de EHRM-rechtspraak. Zij doen dit in uitvoerig gemotiveerde uitspraken, die bovendien meestal beschikbaar worden gesteld in een taal die voor EHRM-rechters goed toegankelijk is. Andersom zijn EHRM-uitspraken voor de juristen in deze staten goed toegankelijk en worden zij erin getraind om met deze uitspraken om te gaan.

In Nederland is er op dit punt het nodige te winnen. Als Nederlandse rechters al afwijken van EVRM-rechtspraak, doen zij dit meestal vrij impliciet; bovendien ontbreekt vaak een goede motivering, waardoor niet altijd duidelijk is of de afwijking welbewust is of eerder berust op een foutieve lezing van EHRM-rechtspraak. Uitspraken van Nederlandse hoogste rechters worden bovendien nog zelden in het Engels vertaald, waardoor het aangaan van een dialoog met het EHRM wordt bemoeilijkt. Andersom zijn Nederlandse juristen weliswaar doordrongen van het belang van het EVRM, maar voelen nationale rechters toch vaak koudwatervrees als het gaat om toepassing van het EVRM. Nederland kan op dit soort punten een meer zichtbare partner worden in de dialoog met het EHRM. De daarmee te behalen winst zal vermoedelijk groter zijn dan die door aanpassing van het constitutionele doorwerkingsinstrumentarium van de rechter.

DEEL II – EVRM-RAPPORT EN LANDENRAPPORTEN

THE EUROPEAN COURT OF HUMAN RIGHTS AND THE NATIONAL COURTS: GIVING SHAPE TO THE NOTION OF 'SHARED RESPONSIBILITY'

Janneke Gerards

1. Introduction

National authorities, including national courts, have generally embraced the work of the European Court of Human Rights (ECtHR or Court). They comply with most of the Court's judgments, even if they are rendered against other states, and they have embedded the Court's interpretations in their legislation, case-law and administrative decisions.[1] It is clear that ECtHR's case law has a considerable impact on national case law, and it is equally clear that this impact has sometimes given rise to (severe) criticism of the Court's work.

The six national reports included in this study explain how domestic courts in western European states have generally responded to the Court's case law and how they deal with the principles and techniques of interpretation and the argumentative techniques and approaches developed in the Court's case law. Moreover, the country reports address the nature and intensity of the criticism of the Court's work and position, as well as the national effects thereof. The present report aims to illuminate the other side of the issue, i.e., the Court's own relationship with the national courts. The question raised is how and to what extent the Court actually obliges national courts to adopt its argumentative methods and principles, the degree to which and the means by which it respects national sensitivities and traditions, and how it responds to national criticism (either political or judicial). In answering these questions, the report's objective is threefold:

First, the report aims to provide a general basis for the national reports by setting out the principles and methods of interpretation that are typical of the Court's case law, the particular objective being to illuminate the way the Court uses these methods and principles to interact with national authorities.

Secondly, the report illuminates the relationship of the Court with the national courts. Special focus here is placed on the notion of 'shared responsibility' for safeguarding the Convention and the notion of judicial dialogue. To illustrate the Court's approach, examples are chosen that are central to recent debates on the Court's work, such as voting rights for prisoners, expulsion of terrorist suspects, use of hearsay evidence in national proceedings, protection of privacy rights of public persons, and crucifixes in schools.

Thirdly, the aim is to highlight the Court's response to criticism and to answer the question of whether such criticism has a visible impact on the Court's case-law.

The research conducted to answer the above questions included an analysis of relevant case law of the Court and the pertinent literature are provided. In addition, to give more depth to the analysis of the various methods and mechanisms, interviews were conducted in September 2012 with six judges and three registrars of the Court. It was agreed with the judges and registrars that their input into the research project would not be visible in a personalised manner. Therefore, the insights derived from the interviews are incorporated in the form of a general explanation of the Court's use and applica-

[1] See further L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *European Journal of International Law* (2008) pp. 125-159.

tion of various methods and its response to national criticism. The questions presented to the interviewees are annexed to the current report.

Hereafter, the findings of the case-law analysis and the interviews are presented in an integrated manner. To provide a solid foundation for the specific methods, techniques and doctrines used in the Court's reasoning, it would seem useful to start with a general survey of the notions and ideas underlying the Court's jurisprudence as a whole (section 2). Only if those are well understood will it be possible to gain a deeper understanding of the various methods and principles. A separate section (section 3) is devoted to the obligations and requirements the Court has imposed on the national courts. This section provides the basis for understanding the national courts' efforts to comply with the Convention, and it may explain the Court's reliance on specific methods of interpretation, such as procedural interpretation and judicial minimalism. Attention is thereby also paid to the doctrine of the margin of appreciation. Section 3 also explores the notion that is central to this report, viz., the notion of 'shared responsibility' between national courts and the ECtHR for the protection of the Convention. Subsequently, sections 4, 5 and 6 focus on a number of principles, methods and techniques the Court uses in its reasoning, with special attention to their function in the relationship between the Court and the national authorities. Section 4 focuses on the meaning and development of the principles of evolutive interpretation, of effective protection of fundamental rights, and of autonomous interpretation. These principles are said to have inspired the great expansion of the Court's case law and they appear to lie at the very heart of most of the criticism aimed at the Court. Attention is thereby also paid to the methods of consensus argumentation and meta-teleological reasoning. Section 5 highlights two methods of argumentation that are of particular relevance to the impact of the Court's case law, viz., procedural review and the use of 'shallow' and 'narrow' reasoning. Section 6 addresses the notion of judicial dialogue and the way it has found its way into the case law and the working methods of the ECtHR. Finally, section 7 discusses the particular responses by the Court to the national criticism, based on the information derived from the interviews held in the Court. A résumé of the most important findings of the report, as well as some concluding remarks, can be found in section 8.

2. The Court's raison d'être

2.1 Introduction

The Court operates in a highly complex context. It is asked to hand down binding judgments in thousands of cases brought by individuals from all over Europe. These cases are of a widely varying nature – they may relate to racial violence,[2] the loss of a social security benefit,[3] or a prohibition of prenatal screening of embryos.[4] In all these cases, the Court must determine which interferences amount to genuine violations of fundamental rights, which cannot be condoned, and which interferences cannot be regarded as acts that contravene the Convention. In doing so, the Court must continuously pay heed to national diversity and national sovereignty – after all, the Court is 'only' an international court with a subsidiary position.

This report analyses how the Court interacts with national authorities and responds to national criticism by means of judicial and argumentative mechanisms. To provide a basis for this, this section provides a brief summary of the Court's three main functions, focusing on the influence they may have on its argumentative approach.

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[2] See e.g. *Fedorchenko and Lozenko* v. *Ukraine*, ECtHR 20 September 2012, appl. no. 387/03.
[3] See e.g. *Czaja* v. *Poland*, ECtHR 2 October 2012, appl. no. 5744/05.
[4] See e.g. *Costa and Pavan* v. *Italy*, ECtHR 28 August 2012, appl. no. 54270/10.

2.2 Individual protection of fundamental rights

The Court's major task is to come to the assistance of individuals who have been harmed by violations of their fundamental rights by national governments or government agents.[5] As a completely external, independent and uninvolved institution, the Court is well placed to decide if a state has failed to comply with its obligations under the Convention. The essential function of individual protection of fundamental rights may explain many of the Court's interpretative approaches and techniques. The Court regards it as its primary role to assess all individual cases on their merits, looking at the particular circumstances of the case to evaluate whether there is a violation.[6] This finds its expression in a strongly case-based case law in which 'judicial minimalism' and *ad hoc* balancing play an important role – the Court primarily decides its cases based on consideration of 'all circumstances of the case' (see below, section 5.3). As a corollary, the Court demands that the national authorities, in their role as primary guarantors of fundamental rights, offer such individual protection at the domestic level. Increasingly, the Court requires judicial review in concrete cases and rejects general legislation or blanket rules that do not allow for concretisation. This is further elaborated below, see section 5.2.

2.3 Interpreting the Convention – guaranteeing a uniform level of protection throughout Europe

The second function of the Court is to determine a minimum level of protection of fundamental rights, which should be guaranteed in all Convention states.[7] This function finds clear expression in the text of the Convention: the Preamble stresses the importance of a system of collective enforcement of fundamental rights.[8] Given the fundamental character of the Convention rights, it is not acceptable if their exercise were to depend on where the individual happens to live. Someone living in the Ukraine should have an equal right to remain free of torture or discrimination, or to express himself freely, as someone living in the Netherlands or in France.[9] Only a central institution such as the ECtHR can uniformly establish the meaning of fundamental rights and define a minimum level of fundamental rights protection that must be guaranteed in all the states of the Council of Europe. For This means that the Court has an essential role to play in standard-setting, even if states may always provide additional protection (Article 53 ECHR).[10] The Court has explained the consequences of this function for its case law in the case of *Soering v. UK*:

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[5] This is generally regarded as the most important function of the Court, which is always emphasised in reports related to the Court's reform; see e.g. see e.g. P. Leach, 'On reform of the European Court of Human Rights', 6 *European Human Rights Law Review* (2009) pp. 725-735; H. Keller, A. Fischer and D. Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', 21 *European Journal of International Law* (2010) pp. 1025-1048; Report of the Committee of Minister's Steering Committee for Human Rights (CDDH) on measures requiring amendment of the European Convention on Human Rights (Strasbourg, February 2012, CDDH(2012)R74 Addendum I). See also H. Keller and A. Stone Sweet, 'Introduction: The Reception of the ECHR in National Legal Orders', in H. Keller and S. Stone Sweet, eds., *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford, OUP 2008) pp. 3-28 at p. 11.

[6] See already *Sunday Times* v. *UK*, ECtHR 26 April 1979, appl. no. 6538/74, para. 65.

[7] Cf. J.H.H. Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press 1999) at p. 105; J.W. Nickel, *Making Sense of Human Rights*, 2nd edn. (Malden, Blackwell 2007) p. 36.

[8] See also Th. Hammarberg, 'The Court of Human Rights versus the *'Court of Public Opinion*'', in: *How can we ensure greater involvement of national courts in the Convention system?*, Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 30-36 at p. 31.

[9] Cf. Weiler 1999, *supra* n. 7, p. 105; D. Galligan and D. Sandler, 'Implementing Human Rights', in S. Halliday and P. Schmidt, eds., *Human Rights Brought Home. Socio-Legal Studies of Human Rights in the National Context* (Oxford, Hart 2004) p. 31; Nickel, *supra* n. 7, at p. 36.

[10] A. Stone Sweet, 'The European Convention on Human Rights and National Constitutional Reordering', 33 *Cardozo Law Review* (2012) pp. 1859-1868, calling this the Court's 'oracular' or 'law-making' function.

> '87. … the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective …. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society".'[11]

This means that the Court cannot limit its work to deciding individual cases on their merits. In accordance with Article 32 of the Convention, the Court has continually stressed that its task is 'not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention'.[12] The notion of providing a minimum level of protection and the need to provide generally applicable interpretations informs many of the argumentative approaches adopted by the Court, especially the evolutive and autonomous interpretation of the Convention. These general principles and doctrines are illuminated in section 4.2. Moreover, the unifying approach of the Court can only be effective if it is endorsed by national courts, i.e., if national courts are willing to apply the Court's interpretations, based on these general interpretative principles, within their own national legal systems. Albeit rather implicitly, the Court has accepted that national courts should follow the Court's argumentative approach and they should apply the interpretations and standards expressed in its case law. This particular fact, which relates to the so-called *res interpretata* effect of the Court's judgments, is discussed separately in section 3.2.

2.4 Subsidiarity, primarity and diversity

Guided by the Court's standards, it is the national authorities' task to guarantee the Convention rights and to protect them at a level that is at least equal to that provided by the ECtHR. The Court has stated time and again that the national authorities are generally better placed than the Court to make policy choices and protect fundamental rights in a way that fits well with national law and national constitutional traditions.[13] Moreover, the Court has stressed that the principle of subsidiarity means that the national authorities should offer primary protection.[14] This principle of primarity is of great importance, as it defines the Court's own task, which is first and foremost one of supervision.[15] Both the principle of subsidiarity and that of primarity will even be laid down in the preamble to the Convention following the entry into force of Protocol No. 15.[16]

In addition, it is important to recall that the ECtHR is a *court* and, as a consequence, it has to operate under the same constitutional restrictions as are in effect in national courts.[17] Accordingly, it

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[11] *Soering* v. *UK*, ECtHR 7 July 1989, appl. no. 14038/88; see also, more recently, *Rantsev* v. *Cyprus and Russia*: 'Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States' (ECtHR 7 January 2010, appl. no. 25965/04, para. 197).

[12] E.g. *Ireland* v. *UK*, ECtHR 18 January 1978, appl. no. 5310/71, para. 154.

[13] See already *Handyside* v. *UK*, ECtHR 7 December 1976, appl. no. 5493/72, para. 48.

[14] See F. Tulkens, *How can we ensure greater involvement of national courts in the Convention system?* Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 6-10 at pp. 6-7. See especially *Fabris v. France*, ECtHR (GC) 7 February 2013, appl. no. 16574/08, para. 72: "... where the applicant's pleas relate to the 'rights and freedoms' guaranteed by the Convention the courts are required to examine them with particular rigour and care and ... this is a corollary of the principle of subsidiarity".

[15] See e.g. *Demopoulos and others* v. *Turkey*, ECtHR (GC) 1 March 2010 (dec.), app. no. 46113/99 and others, para. 69. On the principle of 'primarity', see also in extenso J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden/Boston, Martinus Nijhoff Publishers 2009).

[16] In Draft Protocol No. 15, it is proposed to introduce a paragraph to the preamble to the Convention in which both the principle of subsidiarity and the primary responsibility of the states are emphasised (CDDH, Drafting Group B on the Reform of the Court (GT-GDR-B), Draft Protocol No. 15 – Article 1, GT-GDR-B(2012)R2 Addendum I, 15 October 2012).

[17] See e.g. Ch. McCrudden, 'Judicial Comparativism and Human Rights', in E. Örücü and D. Nelken, eds., *Comparative Law: A Handbook* (Oxford, Hart 2007) pp. 371-398 at p. 376.

has accepted that it should respect the notion of the separation of powers and it should not stretch the rights and obligations under the Convention to the extent that *de facto* new norms are created.[18] Finally, the Court has constantly demonstrated its awareness of national diversity and has tried to respect deeply felt national sensitivities and national (legal, political and social) traditions. It has thereby always accepted and stressed its subsidiary role, as is apparent from one of its earliest landmark cases, the *Belgian Linguistics* case of 1968:

> '… the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.'[19]

These considerations highlight the impact of the subsidiarity principle on the Court's argumentation methods, which has been further developed in subsequent case law. The Court will only accept new interpretations or apply intensive scrutiny to a justification if there is sufficient consensus on a certain topic, or if the Court is at least as well placed as the national authorities to decide a case.[20] It will also usually leave a margin of appreciation to the case, applying a deferential test that leaves sufficient leeway to the states to take their own decisions and express their own policy preferences.[21] Moreover, the principle of subsidiarity leads the Court to apply such methods as autonomous interpretation, procedural review and case-based decision making to minimise intrusion into national policy and domestic law.[22] This leaves the national authorities, including the national courts, with much freedom to decide how they want to comply with the Convention obligations. This freedom is limited, however, by the main objective of the Convention, viz., the objective to provide effective protection to fundamental rights. In its case law, the Court may applaud national authorities for the way they have dealt with fundamental rights issues, but it may also be very critical of the remedies and guarantees offered to individuals. By formulating procedural positive obligations, the Court may encourage the states to respect the Convention, while permitting the Court itself to remain at a distance and exercise only deferential, substantive review.

2.5 The 'push' and 'pull' factors in the Court's work

The basic principles governing the Court's work thus can be easily summarised.[23] In order to provide effective enjoyment of fundamental rights, which is the core objective of the Convention:

1) states have the primary obligation to respect and protect Convention rights;
2) the minimum level of protection they have to guarantee is determined by the ECtHR, which is competent to interpret the Convention;
3) the Court has a supervisory role and can decide if the states have complied with their obligations in individual cases.

Theoretically, the three functions of the Court and the ECHR system of supervision are complementary. In practice, however, such complementarity appears to be very difficult to achieve. National sovereignty and deeply felt national constitutional values may result in strong disagreement with the level of protection the Court has defined. It is often stressed that fundamental rights can be guaran-

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[18] See e.g. *Quark Fishing Ltd.* v. *UK*, ECtHR 19 September 2006 (dec.), appl. no. 15305/06, para. 53.
[19] *Belgian Linguistics Case* (App no 1474/62) Series A no 6, para I.B.10. See also Christoffersen 2009, *supra* n. 15, at p. 248.
[20] Cf. A. Stone Sweet 2012, *supra* n. 10, at p. 1863.
[21] See *infra*, section 3.4.
[22] See *infra*, sections 4 and 5.
[23] For similar summaries, see Stone Sweet 2012, *supra* n. 10, at p. 1861 and Hammarberg, *supra* n. 8, at pp. 30-31.

teed and protected in different ways, and that a particular national situation may merit a special interpretation, or justify special restrictions on their exercise.[24] Indeed, it has sometimes been argued that the Court's legitimacy depends on its preparedness to respect the diversity of fundamental rights standards in Europe.[25] Others have argued that such differences should not be taken into account, since it is only the effectiveness of the Convention rights that counts.[26] Thus, there appears to be an almost inherent conflict between its primary task to provide effective protection of the Convention, and the need to respect national values and national traditions.[27]

In reality, rather than complementarity there seems to be an unavoidable tension between the national desire to protect fundamental rights in a way the state thinks fit (which could be regarded as the Court's 'pull factor'), and the ECtHR's task to supervise the compliance of national fundamental rights protection with the Convention (the Court's 'push factor').[28] Indeed, almost all national criticism of the Court can be traced back to this tension, which also underlies and informs all of the Court's interpretative activities, as well as the extent to which it is able to influence national judicial decision making. For that reason, the push and pull factors of the Convention system figure prominently in this report as a background to the Court's activities.

3. The shared responsibility of the Court and national institutions, in particular national courts

3.1 Introduction

Section 2 has discussed the main functions of the Convention system. It has also been made clear that these functions are only rarely complementary: in most cases, the Court has to deal with a certain amount of tension between the need to provide effective protection of the Convention and the need to respect national sovereign powers and national constitutional values. There is more to be said about the Court's role, however, as a result of the development of the so-called doctrine of *res interpretata* (i.e., the binding character of the Court's interpretations as part of the states' Convention obligations), of international rules on state responsibility, and of the particular obligations of national courts under the Convention. This section explains that the combination of these particular aspects of the Convention means that the national courts and the Court have a 'shared responsibility' to protect the Convention.

The notion of shared responsibility can be seen as some sort of response to the tension between the national and the European level of protection, which was discussed in section 2.5. If the national courts are made co-responsible for compliance with the Convention, it would be easier to arrive at an

[24] See e.g. S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge, CUP 2006) p. 224; J.H. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', *European Law Journal* (2011) pp. 80-120; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia 2002) p. 241; e.g. P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?', 19 *Human Rights Law Journal* (1998) p. 1 at p. 12; A. Ostrovsky, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals', 1 *Hanse Law Review* (2005) p. 47 at p. 57.

[25] J.V.A.G. Piret, 'Limitations of Supranational Jurisdiction, Judicial Restraint and the Nature of Treaty Law', in J. Temperman, ed., *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff Publishers, Leiden 2012) pp. 59-89 at p. 77.

[26] On this, see e.g. J.A. Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', 54 *International Comparative Law Quarterly* (2005) p. 459; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, OUP 2007) p. 123.

[27] See also M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*, trans. N. Norberg (Oxford/Portland, Hart 2009) and H.P. Glenn, *Legal Traditions of the World*, 4th Edn. (Oxford, Oxford University Press 2010).

[28] See for this terminology also M. Andenas and E. Bjorge, 'National Implementation of ECHR Rights: Kant's Categorical Imperative and the Convention', University of Oslo Faculty of Law Legal Studies Research Paper Series, No. 2011-15, http://ssrn.com/abstract=1818845, pp. 7 and 8.

adequate level of Convention protection. Indeed, as is further explored in sections 4, 5 and 6, the Court has made a great effort to develop its argumentation methods and approaches, as well as the notion of judicial dialogue, in such a way as to contribute to this idea of shared responsibility.

Section 3.2 sets out the legal notions and concepts underlying the notion of shared responsibility. The obligations on the national courts that actually result from the Convention and the Court's case law are then explained further (section 3.3), as well as how and to what extent the Court's margin of appreciation doctrine might be relevant to the national courts' work (section 3.4). This is particularly relevant given the focus of this chapter on the national implementation of Convention obligations,. By way of conclusion, the notion of shared responsibility is further explored in section 3.5.

3.2 Erga omnes effect and res interpretata

The Court's judgments are officially only binding on the parties to the case (see Article 46 of the Convention). Thus, strictly speaking, if a violation has been found in a case against the Netherlands, the other 46 states parties do not have to comply with the judgment or even bother to read it.[29] If a state refuses to accept a judgment handed down in a case to which it was not a party, there are no means to force the state to accept it. The only option is for an individual citizen to lodge an application regarding the same matter against his own government, thus triggering the Court to hand down a judgment that is binding on the state in question.[30] It has become accepted, however, that this limitation of the binding effect of the Court's judgments is only relevant in the concrete evaluation of an alleged violation and its justification, i.e., the operative part of the judgment.[31] The Court's interpretations of the notions contained in the Convention are of a general nature and they can be regarded as determining the meaning of the various terms and concepts contained in the Convention.[32] In the Interlaken Declaration of 2010, the European government leaders even committed themselves to 'taking into account the Court's developing case law, also with a view to considering the conclusions drawn from a judgment finding a violation of the Convention by another State, where the same problem exists within their own legal system'.[33] Indeed, a different view of this would be difficult to reconcile with the Court's function of creating a uniform minimum level of protection throughout Europe. This function requires at the very least the acceptance that an interpretation given in one case, which establishes a certain minimum level of protection, is equally pertinent and applicable in all similar cases.

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[29] Cf. E. Klein, 'Should the binding effect of the judgments of the European Court of Human Rights be extended?', in P. Mahoney, ed., Protecting Human Rights: the European Perspective (Köln, Heymanns 2000) pp. 705-713 at p. 706; G. Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order', 40 *Texas International Law Journal* (2005) p. 359 at p. 374.

[30] See, in particular, S. Beljin, '*Bundesverfassungsgericht* on the status of the European Convention of Human Rights and ECHR decisions in the German legal order. Decision of 14 October 2004', 1 *European Constitutional Law Review* (2005) p. 553 at pp. 558-559; Ress, *supra* n. 29, p. 37.

[31] Cf. L. Garlicki, 'Contrôle de constitutionnalité et contrôle de conventionalité. Sur le dialogue des juges', in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa*, Paris, Dalloz, 2011, pp. 271-280, at p. 280 and, in the same volume, A. Drzemczewski, 'Quelques reflexions sur l'autorité de la chose interprétée par la Cour de Strasbourg', pp. 243-248, at p. 246.

[32] See already S.K. Martens, 'Het Europees Hof voor de Rechten van de Mens en de nationale rechter', *NJCM-Bulletin* (2000) p. 756 at p. 756 and J. Vélu, 'Considérations sur quelques aspects de la coopération entre la Cour européenne des droits de l'homme et les juridictions nationales', in P. Mahoney et al., eds., *Protecting Human Rights: The European Perspective* (Köln, Carl Heymanns Verlag 2000) pp. 1511-1525 at p. 1521; this was expressly recognised by the Parliamentary Assembly of the Council of Europe in 2000: 'The principle of solidarity implies that the case law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice' (PACE Resolution 1226/2000, *Execution of judgments of the European Court of Human Rights*, 28 September 2000 (30th Sitting), para. 3). See also M. Marmo, 'The Execution of Judgments of the European Court of Human Rights – A Political Battle', 15 *Maastricht Journal of European and Comparative Law* (2008) pp. 235-258 at pp. 242-243.

[33] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010 – Action plan, para. B.4.c.

This effect, which is commonly called the *res interpretata* of the Court's interpretations, has expressly been embraced and underlined by the Court,[34] as witnessed by the lists of general interpretative principles with which the Court habitually starts its judgments on the merits.[35] Only after having set out well-established case law, and after having stressed the general applicability of certain interpretations, will the Court apply these general principles and standards to the facts of the case.[36] In addition, the *res interpretata* effect is implicit in the Court's acceptance of 'autonomous interpretations' of the Convention, which means that an interpretation is given to Convention terms (e.g., 'tribunal' or 'family life') that is transversally applicable to all the states and does not depend on the meaning of such terms in national law.[37] Given such autonomous interpretations and the transversal relevance of the Court's general principles of interpretation, it is not surprising that it is now accepted that the states must abide by them.[38]

3.3 The national courts' obligation to comply with the Convention and the Court's interpretations

The *res interpretata* effect of the Court's judgments implies that all national authorities, including national courts, have to comply with the Convention as explained by the Court in its case law, even if their state was not a party to the case in which a certain definition or application was given. Indeed, the aim of establishing a uniform minimum level of protection of fundamental rights throughout Europe can only be realised if all national courts are prepared to adopt the Court's interpretations of the Convention. However, as the national reports in this study show, the national courts may have different competences to accommodate and facilitate the implementation of the Court's interpretations in national law.[39] Some national courts have the power to implement ECtHR case law directly in their national law, e.g., by means of Convention-conform interpretation of national law or even by setting aside or disapplying national legislation if it conflicts with a specific ECtHR interpretation of the Convention. Other national highest courts have more difficulty in following the Court's lead, for example because they lack the competence to review the conformity of national legislation with Convention rights.

In this respect, it is important to note that the Court has always held that the Convention does not impose a certain constitutional structure on the states and, more importantly, it does not require that the states make the Convention directly enforceable through the national courts. As early as the case of *Swedish Engine Drivers' Union* v. *Sweden*, the Court clarified that "... neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention".[40] In the case of

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[34] Cf. *Opuz* v. *Turkey*, ECtHR 9 June 2009, appl. no. 33401/02, para. 163 and *Rantsev* v. *Cyprus and Russia*, ECtHR 7 January 2010, appl. no. 25965/04, para. 197. See also Garlicki, *supra* n. 31, at p. 280; Drzemczewski, *supra* n. 31, at p. 246; C. Van de Heyning, *Fundamental Rights lost in complexity*, PhD thesis University of Antwerp 2011, available via http://ir.anet.ua.ac.be/irua/handle/10067/895430151162165141, p. 180.

[35] See further on these lists e.g. J.H. Gerards, 'Judicial minimalism and "dependency": interpretation of the European Convention in a pluralist Europe', in M. van Roosmalen, et al., eds., *Fundamental rights and Principles* (Antwerp, Intersentia 2013), pp. 73-92 section 3.2; F.M.J. den Houdijker, *Afweging van grondrechten in een veellagig rechtssysteem*, (Nijmegen, WLP 2012), section 10.2.

[36] See also *infra*, section 5.3.3.

[37] See *infra*, section 4.2.3.

[38] See the abovementioned Interlaken Declaration, para. B.4.c. See further on the national implementation and acceptance of this aspect of the Interlaken Declaration: CDDH, Drafting Group A on the Reform of the Court (GT-GDR-A), *Draft CDDH Report on measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations*, GT-GDR-A(2012)R2 Addendum 1, 7 September 2012, paras. 71-95.

[39] See also Stone Sweet 2012, *supra* n. 10, at pp. 1866-1867; for further detail, see H. Keller and A. Stone Sweet, eds., *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press 2008) and G. Martinico and O. Pollicino, eds., *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen, European Law Publishing 2010).

[40] *Swedish Engine Drivers' Union* v. *Sweden*, ECtHR 6 February 1976, appl. no. 5614/72, para. 50.

James and others v. *UK* the Court specified that the Convention does not require direct applicability of the Convention in the national courts:

> 'The Convention is not part of the domestic law of the United Kingdom, nor does there exist any constitutional procedure permitting the validity of laws to be challenged for non-observance of fundamental rights. There thus was, and could be, no domestic remedy in respect of the applicants' complaint that the [contested] legislation itself does not measure up to the standards of the Convention and its Protocols. The Court, however, concurs with the Commission that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms. ....'[41]

The Court's case law on the national obligations to respect the Convention, as interpreted by the Court, reflects a an approach strongly oriented to international law. The state as such is responsible for compliance, as is apparent from Article 1 of the Convention, which is an obligation of result.[42] The states remain free to decide how they want to meet this obligation, although the Court generally requires the state to organise its internal structure in such a manner as to be able to meet its treaty obligations.[43] This is very clear from the case of *Assanidze*, in which the Grand Chamber of the Court posited that

> '... for the purposes of the Convention, the sole issue of relevance is the State's international responsibility, irrespective of the national authority to which the breach of the Convention in the domestic system is imputable'.[44]

Accordingly, the Court never expressly held that national courts (or, for that matter, any other national organs, institutions or administrative bodies) should have certain competences or be able to adopt certain approaches.

Nevertheless, the Court may condemn the state if a violation of the Convention results from a lack of competence to disapply or nullify legislation that is contrary to the Convention.[45] This is readily apparent from the Court's case law. In the case of *Losonci Rose & Rose v. Switzerland*,[46] the Swiss federal court found that an act of parliament violated the principle of gender equality, but it also noted that parliament had expressly decided against an amendment of the relevant legislation to bring it in line with the federal constitution. Under Swiss constitutional law, this meant that the federal court lacked the competence to make any modifications to the act to bring it in line with the right to equal treatment: parliament's view had to prevail. The question arose before the Court whether Switzerland could be blamed for this, since the federal court had had no means to avoid the violation of the Convention. The Court gave a clear answer, based on the international law argument of state responsibility: « Ceci [i.e., the specific division of competences in Switzerland] ne change toutefois en rien la responsabilité internationale de la Suisse au titre de la Convention ».[47] Consequently, it found a violation of the Convention. Although in subsequent cases compliance with the conformity might be guar-

[41] *James and Others* v. *UK*, ECtHR 21 February 1986, appl. no. 8793/79, para. 85.
[42] Cf. J. Polakiewicz, 'The Status of the Convention in National Law', in R. Blackburn and J. Polakiewicz, eds., *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States, 1950-2000* (Oxford, Oxford University Press 2000) pp. 31-53 at pp. 32-33.
[43] Cf. Klein, *supra* n. 29, at p. 709.
[44] *Assanidze* v. *Georgia*, ECtHR 8 April 2004, appl. no. 71503/01, para. 146.
[45] The Court has always stressed, for example, that 'neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction' (*Urban and Urban* v. *Poland*, ECtHR 30 November 2010, appl. no. 23614/08, para. 46; it usually adds to this, however, that regardless of the constitutional system, '[t]he question is always whether, in a given case, the requirements of the Convention are met'.
[46] ECtHR 9 November 2010, appl. no. 664/06.
[47] Para. 50.

anteed by not adopting legislation that violates fundamental rights in the first place, this judgment might be regarded as an invitation to introduce a system of judicial review that allows the national courts to assess the Convention conformity of national legislation.

Furthermore, it is clear that the states are not completely free in meeting their overall obligation to respect the Convention. Several judgments disclose that the Court increasingly sets higher requirements for the national courts to meet. In particular, it follows from cases such as *Pla and Puncernau v Andorra* that the national courts are obliged to take the Convention into account in interpreting national law and even national contracts.[48] In this case the Court found a violation of the Convention because the national courts had interpreted a testamentary provision in accordance with the (supposed) intent of the testator. The Court found this unacceptable, since the interpretation was contrary to the non-discrimination principle laid down in the Convention. In quite general terms, it held that national courts will always need to strive for an interpretation that is in accordance with the Convention, and even that they thereby have to adopt an evolutive approach:

> '62. The Court reiterates that the Convention, which is a dynamic text and entails positive obligations for States, is a living instrument, to be interpreted in the light of present-day conditions …. Thus, even supposing that the testamentary disposition in question did require an interpretation by the domestic courts, that interpretation could not be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix's death, namely in 1939 and 1949 …. Where such a long period has elapsed, during which profound social, economic and legal changes have occurred, the courts cannot ignore these new realities. ... [A]ny interpretation, if interpretation there must be, should endeavour to ascertain the testator's intention and render the will effective, while bearing in mind that "the testator cannot be presumed to have meant what he did not say" and without overlooking the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case-law.'

It is clear from this finding that the states can be held responsible for interpretations and judgments of the national courts, and that the national courts have to copy the Court's own evolutive approach to comply with the minimum standards of the Convention.[49]

Moreover, in the recent case of *Fabris v. France*, the Court's Grand Chamber held that the national courts generally have an obligation to ensure that national legislation is in conformity with the Convention.[50] In particular, it held that this imposes special requirements on the courts if a state has introduced new legislation to implement an earlier judgment of the ECtHR. Such legislation should comply with the state's Convention obligation, but the national courts also have a special task in safeguarding Convention compliance:

> 'This imposes an obligation on the domestic courts to ensure, in conformity with their constitutional order and having regard to the principle of legal certainty, the full effect of the Convention standards, as interpreted by the Court. ...'[51]

This consideration of the Court implies that, if states are confronted with legislative provisions that can be interpreted in different ways, they should use their interpretive competence to ensure that their interpretations are in conformity with the standards formulated by the ECtHR. Moreover, one

48 ECtHR 13 July 2004, appl. no. 69498/01. In similar vein, see *Khurshid Mustafa and Tarzibachi* v. *Sweden*, ECtHR 16 December 2008, appl. no. 23883/06. See also, outside the sphere of contractual obligations, *Paulić* v. *Croatia*, ECtHR 22 October 2009, appl. no, 3572/06, para. 42: '...no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia's obligations under the Convention …'.

49 See also E. Bjorge, 'National supreme courts and the development of ECHR rights', 9 *International Journal of Constitutional Law* (2011) pp. 5-31, giving more examples of cases from which it appears that national courts must apply the principle of evolutive interpretation; see Garlicki, *supra* n. 31, at pp. 274-275; and, for more examples, Ch. de Kruif, *Onderlinge overheidsaansprakelijkheid voor schendingen van Europees recht* [Mutual state responsibility for violations of European Law], Apeldoorn/Antwerpen: Maklu 2012, p. 27 ff.

50 *Fabris v. France*, ECtHR (GC) 7 February 2013, appl. no. 16574/08, para. 72.

51 *Fabris*, para. 75.

may even read the case as implying that national courts should set aside national legislation that clearly conflicts with ECHR provisions as interpreted by the ECtHR.[52]

Hence, there are increasingly strong obligations in the Court's case law on national highest courts to refuse to apply national legislation that is contrary to the Convention and to interpret such legislation in conformity with the Court's case law.[53] Even if there is no general requirement to incorporate the Convention in national law and allow individuals to invoke the Convention directly before the national courts,[54] this means that the Convention has a huge impact on national law, national judicial decision making and national constitutional division of competences.

3.4 The margin of appreciation doctrine and its (ir)relevance for national courts

In relation to the principle of subsidiarity, and looking for ways to give shape to its supervisory role, the Court has developed its famous margin of appreciation doctrine.[55] The existence of this doctrine can only be understood against the background sketched in section 2.4. As mentioned there, the Court acknowledges that the national authorities have the primary responsibility to safeguard the Convention rights. As long as they respect the limits set by the Convention and the case law of the Court, i.e., as long as they do not fall below the minimum level of Convention protection, they have great freedom to make their own choices and decide which restrictions or exceptions are necessary and reasonable. Indeed, as expressed in the Court's 'better placed argument', they are usually in the best position to make these choices and decisions.[56] The national authorities know the national circumstances and traditions best, they have better means than the Court has to gauge public and political support for decisions in delicate socioeconomic fields, and they can better appraise the pertinent individual and general interests.

The better placed argument has proved very important in defining the Court's judicial strategy. The Court itself has often stressed that, given the better position of the national authorities to regulate fundamental rights issues, it should only exercise a subsidiary and supervisory role.[57] It is this recognition of the primary role of the national authorities and the subsidiary role of the Court that underlies the Court's well known margin of appreciation doctrine. This is well expressed in one of

[52] See further on this reading the case-note by Gerards to the case in *European Human Rights Cases* 2013/88 (in Dutch).
[53] See also Stone Sweet 2012, *supra* n. 10, at pp. 1866-1867.
[54] Cf. e.g. Ress, *supra* n. 29, at p. 374; Vélu, *supra* n. 32, at pp. 1515-1516.
[55] The doctrine and its effect have been analysed and discussed extensively; for a few of the most important contributions, see T.A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', 4 *Human Rights Quarterly* (1982) pp. 474-496; R.St.J. Macdonald, 'The Margin of Appreciation', in R.St.J. Macdonald et al., eds., *The European System for the Protection of Human Rights* (Dordrecht/Boston/London, Martinus Nijhoff 1993) pp. 83-124; E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996) pp. 240-350; N. Lavender, 'The Problem of the Margin of Appreciation' 4 *European Human Rights Law Review* (1997) p. 380; J.G.C. Schokkenbroek, 'The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 19 *Human Rights Law Journal* (1998) pp. 30-36; E. Benvenisti, 'Margin of appreciation, consensus, and universal standards', 31 *New York University Journal of International Law and Politics* (1999) p. 843; M.R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', 48 *International Comparative Law Quarterly* (1999) p. 641; S. Greer, *The Margin of Appreciation: interpretation and discretion under the European Convention on Human Rights*, Human Rights Files No. 17 (Strasbourg, Council of Europe Publishing 2000); Lord Mackay of Clashfern, 'The margin of appreciation and the need for balance', in P. Mahoney, ed., *Protecting Human Rights: The European Perspective* (Köln, Heymanns 2000) p. 837; Arai-Takahashi, *supra* n. 24; Ostrovsky, *supra* n. 24; Sweeney, *supra* n. 26; G. Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) pp. 705-732; Christoffersen, *supra* n. 15; Gerards 2011, *supra* n. 24; J. Kratochvíl, 'The inflation of the margin of appreciation by the European Court of Human Rights', 29 *Netherlands Quarterly of Human Rights* (2011) pp. 324-357; D. Spielmann, 'Allowing the right margin. The European Court of Human Rights and the national margin of appreciation doctrine: waiver or subsidiarity of european review?', CELS Working Paper 2012, via www.cels.law.cam.ac.uk.
[56] See *supra*, section 2.4.
[57] See *supra*, section 2.4.

the Court's early landmark cases, *Handyside* v. *UK*, which concerned the conformity of a limitation of the freedom of expression with Article 10 para. 2 of the Convention:[58]

> 'The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights …. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. ….
> … By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. … [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.
> Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force ….'[59]

Although the application of the doctrine is relatively blurred and unclear (and the doctrine has been strongly criticised for that reason), its importance for the Convention system as a whole is undisputed.[60] In practice, the doctrine functions as a yardstick for the intensity of the Court's scrutiny of arguments advanced in justification of an interference.[61] The Court thereby uses a sliding scale model, with a relatively clear difference between leaving a 'wide margin of appreciation' and leaving a narrow one.[62] If a wide margin is permitted to the national authorities, the Court usually only superficially and rather generally examines the choices made by the national authorities to see whether the result is (clearly) unreasonable or disproportionate, or places an excessive burden on the applicant.[63] The burden of proof to show that a national measure is unjustified is then often placed with the applicant parties.[64] By contrast, if a narrow margin is left, the Court generally closely considers the facts of the case. It then carefully determines the interests at stake and it decides for itself where the balance between the conflicting interests should have been struck. The national authorities then bear the burden of showing that the limitation of rights was based on careful and objective assess-

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[58] *Handyside* v. *UK*, ECtHR 7 December 1976, appl. no. 5493/72.
[59] *Handyside*, para. 48.
[60] See in particular the sources mentioned in n. 55 *supra*.
[61] Although it is precisely here that there is some confusion on the effect of the doctrine. Some scholars have rightly stated that the determination of the scope of the margin of appreciation is sometimes presented as an outcome of substantive assessment of a justification, rather than as a tool to determine the intensity of review in a preliminary stage; see in particular Letsas 2006, *supra* n. 55.
[62] On the problematic translation from margin of appreciation into standards of review, see in extenso Christoffersen, *supra* n. 15, at p. 265 and Lavender, *supra* n. 55, at p. 387. For the factors determining the scope of the margin of appreciation, see e.g. Brems, *supra* n. 55, Arai-Takahashi, *supra* n. 24 and Gerards 2011, *supra* n. 24.
[63] A classic example of deferential review is the case of *James and others* v. *UK*, ECtHR 21 February 1986, appl. no. 8793/79, in which the Court allowed the national authorities a wide margin of appreciation in the context of property regulation. This wide margin corresponded to a lenient test of necessity: the Court explained that '[i]t is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way' (para. 51). For other examples, see *Rasmussen* v. *Denmark*, ECtHR 28 November 1984, appl. no. 8777/79, para. 41; *Fretté* v. *France*, ECtHR 26 February 2002, appl. no. 36515/97, para. 42; *Pla and Puncernau* v. *Andorra*, ECtHR 13 July 2004, appl. no. 69498/01, para. 46; *Anheuser-Busch Inc.* v. *Portugal*, ECtHR (GC) 11 January 2007, appl. no. 73049/01, para. 83; *Bulgakov* v. *Ukraine*, ECtHR 11 September 2007, appl. no. 59894/00; *Kearns* v. *France*, ECtHR 10 January 2008, app. no. 35991/04, paras. 80-84; *A. and others* v. *the United Kingdom*, ECtHR (GC) 19 February 2009, appl. no. 3455/05, para. 176; *A., B. and C.* v. *Ireland*, ECtHR (GC) 16 December 2010, appl. no. 25579/05, paras. 233ff. On this, see also J.H. Gerards, *Judicial Review in Equal Treatment Cases* (Leiden, Martinus Nijhoff 2005) p. 155; P. Mahoney, 'Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin', 11 *Human Rights Law Journal* (1990) p. 57 at pp. 78 and 87.
[64] See e.g. *Greenpeace e.V. and others* v. *Germany*, ECHR 12 May 2009 (dec.), appl. no. 18215/06. In this case the applicants complained of the refusal by the German government to take specific measures against car manufacturers in order to reduce respirable car dust emissions of diesel vehicles. The ECtHR held that it has a fundamentally subsidiary role in this type of case. Bearing this role in mind, it held that '…the applicants have not shown – and the documents submitted do not demonstrate – that the Contracting State, when it refused to take the specific measures requested by the applicants, exceeded its discretionary power…'.

ment of facts and interests and, more generally, that it was reasonable.[65] Furthermore, in most of these cases the Court applies a strict test of necessity or subsidiarity, often mentioning the availability of less intrusive measures to underpin its judgment that the interference cannot be held to be justified, or criticising the lack of possibilities for individualised judgments on the national level.[66]

Hence, the margin of appreciation doctrine is of great importance to the states as well as the Court. For the states, the doctrine literally determines the margins within which they can freely take decisions. For the Court, the doctrine determines the strictness of its review and, thereby, the intensity with which it scrutinises national legislation and decisions. For that reason, some governments, such as those of the Netherlands and the UK, have advocated that the Court should leave a wider margin of appreciation to the states.[67] By doing so, in their view, the Court would be more respectful of national sovereignty and the fact that national authorities are best placed to apply the Convention in the national context. Nevertheless, scholars have argued that it is primarily the flexibility of the doctrine that gives it its force and impact.[68] By narrowing the margin of appreciation in cases where core fundamental rights are at stake or where the interference is particularly serious, the Court can exercise effective supervision and control over national acts and decisions.[69] For that reason, the provision to be added to the Convention's preamble will probably state that it remains the Court's prerogative to determine the scope of the margin of appreciation.[70] This is for good reason, as only then can the doctrine play its crucial role in negotiating between the need to respect national sovereignty and national diversity, and the need to protect fundamental rights at a reasonable level.[71]

It is thus clear that the margin of appreciation doctrine is of fundamental importance to the system of Convention supervision as a whole. The question sometimes raised, however, concerns the extent to which the doctrine may (or must) influence national judicial decision making. This influence proves to be very limited indeed. The margin of appreciation doctrine is an instrument of the Court to determine its relationship with the states. Given the Court's reliance on the international law notion of state responsibility, the doctrine is not to have any impact on the internal division of competences or the separation of powers.[72] The margin is accorded to the states as a whole, regardless of their internal structure or division of competences.[73] This means that the doctrine as such is also applicable to

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[65] See e.g. *Connors* v. *UK*, ECtHR 27 May 2004, appl. no. 66746/01, para. 94. See also *Makhmudov* v. *Russia*, ECtHR 26 July 2007, appl. no. 35082/04.

[66] See e.g. *Informationsverein Lentia* v. *Austria*, ECtHR 24 november 1993, appl. no. 13914/88, paras. 39 and 42; *Fuentes Bobo* v. *Spain*, ECtHR 29 February 2000, appl. no. 39293/98, para. 49; *S. and Marper* v. *UK*, ECtHR 4 December 2008, appl. nos. 30562/04 and 30566/04, paras 119-120.

[67] This was expressed by the Dutch government, for example, in a letter to the Dutch Parliament in which it explained its ideas on the future of the ECtHR; see (in Dutch) *Kamerstukken II* 2011/12, 32735, no. 32. The Senate responded to this by adopting a resolution, almost unanimously, in which it asked the government to abandon the issue of advocating a greater margin of appreciation for the states (*Kamerstukken I* 2011/12, 32735, no. C). For the UK, see in particular the leaked version of the British draft declaration for the intergovernmental conference in Brighton in April 2012: <http://www.guardian.co.uk/law/interactive/2012/feb/28/echr-reform-uk-draft>, paras. 15-19.

[68] See the various contributions cited *supra*, n. 55.

[69] See in particular Macdonald, *supra* n. 55, at p.123; Arai-Takahashi, *supra* n. 24, at p. 236; Ostrovsky, *supra* n. 24, at p. 58, Gerards 2011, *supra* n. 24, at p. 105.

[70] The most recent proposal available at the time of writing was still carefully defined, stating that 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention' (Draft Protocol No. 15 to the Convention, Final Text as adopted by the CDDH and checked by the Treaty Office and Editorial Unit, Strasbourg, 30 November 2012, CDDH(2012)R76 Addendum III, Article 1).

[71] On this special value of the doctrine, see more elaborately also Glenn, *supra* n. 27, ch. 10.

[72] See also *supra*, section 3.3.

[73] Mostly the Court only mentions that '… *Contracting States* must have a broad margin of appreciation' (e.g. *MGN Limited* v. *UK*, ECtHR 18 January 2011, appl. no. 39401/04, para. 142, emphasis added). Sometimes the Court makes clear which state body should be accorded a margin of appreciation, which makes clear that, in practice, the margin is accorded to all state organs, including the courts; see e.g. *Pye* v. *UK*, ECtHR (GC) 30 August 2007, appl. no. 44302/02, para. 71 (margin of appreciation is accorded to the legislature); *Buckley* v. *UK*, ECtHR 25 September 1996, appl. no. 20348/92, para. 75 (the local bodies taking a planning decision), *MGN Limited* v. *UK*, ECtHR 18 January 2011, appl. no. 39401/04, par. 150 (the national court);

the national court, meaning that they, just as much as the national legislature or national administrative bodies, have a certain amount of discretion to offer judgment in accordance with national law. In the case of *A. and others* v. *the United Kingdom*, the Court clarified that '… the domestic courts are part of the "national authorities" to which the Court affords a wide margin of appreciation …'.[74]

Thus, if a wide margin of appreciation is accorded to the states, the national courts have more leeway to assess the reasonableness and proportionality of interferences with fundamental rights than if a narrow margin is left. There, however, the relevance of the doctrine to national law ends. Importantly, the doctrine says nothing about the way national courts should behave towards other branches of government. Put differently: if there is a wide margin of appreciation under the Convention, this does not imply that the *national* court must show judicial restraint towards the legislature or the administrative bodies.[75] The Court's Grand Chamber stressed this in *A. and others* v. *UK*, where it said that '[t]he doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level.'[76]

Whereas the national courts are held to implement the Court's interpretations and, to some extent, copy its interpretative approach, as has been explained in section 3.3, this does not imply that they are at all required to duplicate the Court's application of the margin of appreciation doctrine. On the contrary: given the primary responsibility of the state for the protection of the Convention rights, it may be important for the national court to carefully assess the reasonableness of interferences with Convention rights by the legislature or administrative organs.[77] Of course, there may be good reason for the national courts to defer to the legislature or the executive by exercising restraint in fundamental rights cases. In such cases, however, the intensity of the national courts' review is not determined by the margin of appreciation case law of the Court, but by national standards for deference (even if these standards may seem similar to those applied by the Court to determine the scope of the national margin of appreciation). If national courts were to automatically translate a wide margin of appreciation to deferential judicial review, this would be a misinterpretation of the doctrine. Indeed, the notion of 'shared responsibility', discussed below, can only be effective if the national courts effectively exercise their supervisory and corrective tasks and do not hide behind a doctrine that is not applicable at the domestic level.

3.5 'Shared responsibility': the national courts and the ECtHR as partners in guaranteeing the Convention

It is clear from the discussion above that the national courts have a very important role to play in guaranteeing the primary protection of the Convention. The State can be held accountable before the Court if national courts have not met their duty to guarantee the compliance of national law with the Convention, either from oversight or because of a lack of competence. The important task of the national courts is also apparent from the Convention text itself. Article 35 stipulates that the Court can only review applications on their merits if all national remedies have been exhausted.[78] The Court has often made clear that this provision aims to offer a possibility for reparation and correction of

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Von Hannover (No. 2) v. *Germany*, ECtHR (GC) 7 February 2012, appl. nos. 40660/08 and 60641/08, par. 105 (the national court and the national legislature jointly). On this, see more elaborately (in Dutch) N. Jak and J. Vermont, 'De Nederlandse rechter en de *margin of appreciation*. De rol van de *margin of appreciation* in de interne horizontale relatie tussen de rechter, de wetgever en het bestuur' [The Dutch court and the margin of appreciation. The role of the margin of appreciation in the internal horizontal relationship between the judiciary, the legislature, and the executive], 32 *NJCM-Bulletin* (2007) p. 125.

[74] *A. and others* v. *UK*, ECtHR (GC) 19 February 2009, appl. no. 3455/05, para. 176.

[75] See also Jak and Vermont, *supra* n. 73, at p. 133; Spielmann, *supra* n. 55 at pp. 24-26; Van de Heyning, *supra* n. 34, p. 203.

[76] *A and others* v. *the United Kingdom*, ECtHR (GC) 19 February 2009, appl. no. 3455/05, para. 184; see also Spielmann, *supra* n. 55 at p. 24.

[77] See also Jak and Vermont, *supra* n. 73, at pp. 132-133.

[78] On this, see also Tulkens 2012, *supra* n. 14, at p. 6.

flawed legislation or administrative acts, which the states should fully use to comply with their primary obligation under Article 1 of the Convention to guarantee the Convention rights.[79] Only if national judicial proceedings have not offered redress may the Court take a second look at the case.

This division of competences between the national courts and the ECtHR evidently places a rather heavy responsibility on the national courts. They have to make sure that the Court's case law is implemented and respected in their own judgments and decisions and they have to fully exploit their competences to secure compliance with the Convention. It is likely that national courts will not always be willing or able to meet these obligations, for example if they disagree with the Court's findings, or if they lack the competence to comply. If that situation arises, it is obvious that the Court finds itself in a rather weak position, as it lacks strong powers to force the states into compliance – finding a violation against the state may often not be enough to bring about structural change.[80] The Court thus depends on constructive collaboration with the national courts and on the persuasiveness and quality of its interpretations: it has to persuade and cajole national courts into compliance, rather than force them.[81] Indeed, the Court itself has accepted that the crucial role of the national courts brings about a kind of 'shared responsibility' for guaranteeing the rights of the Convention, and it has stressed the importance of active involvement of national courts in the Convention system.[82] This means that it will still supervise national judicial decisions and their compatibility with the Convention, as well as the quality of procedural guarantees, but in doing so, it takes national judicial decision making very seriously. This is well expressed in the Court's procedural line of case law (discussed in more detail in section 5.2), which makes it clear that the Court will generally respect national judicial interpretations and applications of the Convention as long as the national courts have made a serious effort to decide a case on the basis of the Court's case law and the standards developed therein. In such cases the Court leaves the national courts a lot of leeway to decide the case on the substance of the facts at issue. In particular, this means that the Court often is not very critical on balancing acts performed by national courts.

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[79] See in particular, and very explicitly, the Grand Chamber's judgment in *Demopoulos and others* v. *Turkey*, ECtHR (GC) 1 March 2010, appl. no. 46113/11 and others: '69. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system .... The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions.'

[80] Cf. Keller and Stone Sweet 2008, *supra* n. 5, at p. 14.

[81] A.M. Slaughter, 'A Typology of Transjudicial Communication', 29 *University of Richmond Law Review* (1994) pp. 99-137 at pp. 124-125; H. Keller and A. Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems', in H. Keller and A. Stone Sweet eds., *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford, OUP 2008) pp. 677-712 at p. 707; G. Lübbe-Wolf, 'How can the European Court of Human Rights Reinforce the Role of National Courts in the Convention System?' in *How can we ensure greater involvement of national courts in the Convention system?* Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 11-16 at p. 11. See also J.H. Gerards, 'Argumentatie in een pluralistisch rechtssysteem – de uitdaging voor de Europese hoven', in E. Feteris et al., eds., *Gewogen oordelen. Essays over argumentatie en recht* (Amsterdam: Boom 2012) pp. 21-40 at pp. 24-25; Gerards 2013, *supra* n. 35.

[82] The Court expressly mentioned the need for 'shared responsibility' in its *Preliminary Opinion in preparation of the Brighton Conference*, adopted by the Plenary Court on 20 February 2012, para. 4. See also N. Bratza, 'The relationship between the UK courts and Strasbourg', 5 *European Human Rights Law Review* (2011) pp. 505-512 at p. 511; N. Bratza, 'Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year', in: *How can we ensure greater involvement of national courts in the Convention system?*, Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 24-29 at pp. 26-27; Tulkens 2012, *supra* n. 14, at p. 8. See further Letsas 2007, *supra* n. 26, at p. 83. This also has practical advantages, as stressed by Helfer and Arai-Takahashi – if domestic judges and authorities act as 'first-line defenders' of Convention rights, this will enhance judicial expediency and efficiency on the level of the ECtHR. Having regard to its limited resources, such a division of labour is of great value to the ECtHR; see Helfer 2008, *supra* n. 1, at pp. 128 and 135 and Arai-Takahashi, *supra* n. 24.

Moreover, in recent years, the Court has shown itself receptive to the difficulties experienced by national courts in applying the Court's case law, as well as to criticism of the Court's case law that finds expression in national judgments. National courts sometimes stress the need for a specific definition or application of a certain Convention notion, or of a certain precedent, which would fit better with their national legal systems than the approach favoured by the Court. It is not uncommon for the Court to respond to such national judicial opinions by adopting a new and (slightly) different interpretation[83] or to provide a more extensive explanation for a certain reading of a Convention provision.[84] In other cases, the Court may evaluate (and eventually approve of) changes in national judicial standards or legislation that have been made in response to earlier case law of the Court.[85] This is what is often referred to as 'judicial dialogue', which is discussed in more detail below in section 6. Engaging in such a dialogue is clearly conducive to reducing tension between the national and the ECtHR level, as well as to protection of Convention rights. Close collaboration between the Court and the national authorities (the courts in particular) may, first, increase the legitimacy and acceptability of the Court's judgments. Such judgments are then not the result of a 'monologue' or 'Alleingang' by the Court, but of co-operation between the national authorities and the Court.[86] Moreover, it may be important for the acceptance of the Court's interpretations that they are expressly informed by and based on national law, rather than on 'moral' arguments alone.[87] Finally, active participation by national authorities in the process of Convention interpretation and dialogue may enhance their own power and authority; indeed, this may encourage national authorities to adopt the Court's approaches and judgments in a positive manner.[88] If the result is that the national authorities come to operate in tandem with the Court, rather than in conflict with it, they may thereby contribute to the increased protection of fundamental rights.[89]

Thus, the acceptance of a notion of 'shared responsibility' of guaranteeing Convention rights is essential for the Court and for the effective protection of the Convention rights. This means that the Court has to ensure that the national courts, but preferably national authorities more generally, become its allies in protecting fundamental rights, by persuading them and coaxing them to adopt the approach the Court itself has selected. From this perspective, it is interesting to study the Court's various interpretative techniques and argumentative methods to evaluate their capacity to enhance the sharing of responsibility and the dialogue between the states and the Court.

4. Giving shape to shared responsibility: principles and methods of interpretation

4.1 Introduction

Some critics of the Court have argued that the Court's case law is essentially activist and political in nature, especially since the Court has always stressed that the Convention must be read 'in the light of present day conditions', and interpretations must be such as to make the exercise of rights 'practical and effective'. Moreover, it is sometimes stated that the Court 'overreaches' by giving autonomous

[83] See e.g. *Scoppola (No. 3)* v. *Italy*, ECtHR (GC) 22 May 2012, appl. no 126/05; in this judgment the Court adopted an interpretation that differed from its earlier stance in *Frödl* v. *Austria*, ECtHR 8 April 2010, appl. no. 20201/04. See further on this section 5.3.3.
[84] E.g. *Al-Khawaja and Tahery* v. *UK*, ECtHR (GC) 15 December 2011, appl. nos. 26766/05 and 22228/06. See further on this section 6.2.
[85] E.g. *Von Hannover No. 2* v. *Germany*, ECtHR (GC) 7 February 2012, appl. nos. 40660/08 and 60641/08; *Haidn* v. *Germany*, ECtHR 13 January 2011, appl. no. 6587/04; *Othman (Abu Qatada)* v. *UK*, ECtHR 17 January 2012, appl. no. 8139/09. See further on this section 6.2.2.
[86] Cf. A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (Oxford, Oxford University Press 2009) p. 110.
[87] See hereinafter, section 6.2.
[88] Cf. Weiler, *supra* n. 7, at p. 2426; Slaughter 1994, *supra* n. 81, at p. 115.
[89] Slaughter 1994, *supra* n. 81, at p. 115.

readings to the Convention, rather than interpretations that are closely geared to national interpretations. It is thereby implicitly stated that the Court prefers a high-standard moral reading of the Convention, rather than one that is based on the actual limitations of the text of the Convention and the international law principles of interpretation, and one that is not in line with the principle of subsidiarity and notions of sovereignty.

Indeed, the acceptance and application of general interpretative principles such as evolutive, practical and effective interpretation, and autonomous interpretation have led the Court to give a rather generous reading of many Convention rights, in particular Articles 3 (prohibition of torture), 8 (privacy and family life) and 1 First Protocol (property). At the same time, the Court can also use these methods to emphasise the importance of shared responsibility and subsidiarity and it can use them to negotiate between the push and pull factors described in section 2.5.

This section illuminates the use the Court has made of these special principles and methods of interpretation to enhance collaboration between national courts and the ECtHR. After a general description of the meaning of the various principles and methods, the Court's strategic use of them is highlighted. Subsequently, it is shown that, occasionally, their use can have a contrary effect and may lead to significant legitimacy criticism.[90] Finally, an explanation is given of how the Court tries to respond to this criticism by giving a special application to the various methods and principles.

Before exploring these issues, it is important to stress that the Court uses many methods of interpretation that are not discussed in this section. In accordance with the general rules of interpretation mentioned in the Vienna Convention on the Law of Treaties, the Court often relies on classical methods of textual and systematic interpretation, or interpretation based on the *travaux préparatoires* of the Convention.[91] These methods are not specifically interesting to this report, however, as we are here mainly concerned with the special way the Court gives shape to the Convention and the way it interacts with national authorities in this respect. For that reason they will not be addressed further here.

4.2 Basics of Convention interpretation

4.2.1 Evolutive and consensus interpretation

The understanding of fundamental rights is continually changing as a result of societal and technological developments and changes in views on fundamental rights.[92] While it was long accepted, for example, that the notion of 'inhuman and degrading' treatment only related to extreme situations of ill treatment, the Court has now accepted that caning in schools also comes within the prohibition of degrading treatment in Article 3 ECHR.[93] In doing so, the Court mentioned expressly that 'the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.'[94] Likewise, it has gradually come to accept that the death penalty cannot be reconciled with the underlying values of the Convention,[95] and that conscientious objections to compulsory military service must be recognised[96]. Thus, changes in societal and legal views on a certain topic are reflected in the Court's interpretations. The rationale

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[90] See also N. Krisch, 'The Open Architecture of European Human Rights Law', 71 *Modern Law Review* (2008) pp. 183-216 at p. 206.
[91] See in more detail, in Dutch, J.H. Gerards, *EVRM – algemene beginselen* (The Hague, Sdu 2011) ch. 1.
[92] J. Mahoney, *The Challenge of Human Rights. Origin, Development and Significance* (Malden, Blackwell 2007) p. 97. For a good analysis of the evolution of the Convention, see also E. Bates, *The Evolution of the European Convention on Human Rights – From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, Oxford University Press 2010) in particular chapter 9.
[93] *Tyrer* v. *UK*, ECtHR 25 April 1978, appl. no. 5856/72.
[94] Para. 31.
[95] *Al-Saadoon and Mufdhi* v. *UK*, ECtHR 2 March 2010, appl. no. 61498/08, para. 120.
[96] *Bayatyan* v. *Armenia*, ECtHR 27 October 2009, appl. no. 23459/03.

for adopting such an evolutive approach is obvious: If the Court were not to take developments in opinions and views into account, the Convention would quickly get out of step with national fundamental rights law and policy, and the Court would have great difficulty in fulfilling its task to provide a pan-European minimum level of protection of fundamental rights.

Evolutive interpretation also means that the interpretation of the Convention must be adapted to technological, factual and legal developments. The right to respect for an individual's privacy is now held to cover not only classic searches in one's home and telephone tapping, but also, for example, the placement of GPS instruments in one's car.[97] The right to physical integrity, protected by Article 8, is now held to cover DNA samples.[98] And in the same vein, the Court has accepted that the availability of the internet has led to new fundamental rights issues that are covered by the right to privacy (e.g., the long-term availability of personal data and difficulties related to not being able to fully remove personal information from the internet or data bases),[99] and freedom of expression (e.g., the possibility to place information on the internet).[100] Such evolutive interpretations are almost unavoidable, given the Court's task to provide an adequate minimum level of protection.

To adapt its interpretations to present-day societal and legal views and opinions, the Court uses a special interpretative method, i.e., 'common ground' or 'consensus' interpretation.[101] The method implies that the Court will usually accept a novel (mostly wider) interpretation of the Convention if there is a sufficiently clear European consensus on the classification of a certain aspect of a right as part of a Convention right.[102] Using this approach, for example, the Court has come to accept that Article 8 of the Convention (protecting the right to respect for one's private life) covers assisted suicide[103] and abortion[104], a right to procreation[105] and a right to legal recognition of gender transformation.[106] To discover if there is a sufficient consensus (or rather: convergence of legal views in Europe) to support a novel Convention interpretation, the Court looks at comparative studies (either produced by one of the intervening parties or, especially in Grand Chamber cases, by the Court's registry),[107] at international treaties[108] and reports of international organisations,[109] and at EU law[110].[111] Clearly, this reliance on changes, developments and trends in national and international law leads to a dynamic and evolutive reading of the Convention.

4.2.2 Practical and effective rights and meta-teleological interpretation

The Court does not restrict the basis for its interpretation to evolutive interpretation and the need to attune its interpretation to the views and opinions expressed in the various European states. It also

[97] *Üzun* v. *Germany*, ECtHR 2 September 2010, appl. no. 35632/05.
[98] *S. and Marper* v. *UK*, ECtHR (GC) 4 December 2008, appl. nos. 30562/04 and 30566/04.
[99] See e.g. *Khelili* v. *Switzerland*, ECtHR 18 October 2011, appl. no. 16188/07.
[100] See e.g. *Mouvement Raëlien Suisse* v. *Switzerland*, ECtHR (GC) 13 July 2012, appl. nos. 16354/06 and 16354/06.
[101] On this method, see in extenso (and with many references) H.C.K. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System. An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Antwerp, Intersentia 2011).
[102] Cf. *Christine Goodwin* v. *UK*, ECtHR (GC) 11 July 2002, appl. no. 28957/95, para. 74: '... the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved...'.
[103] *Haas* v. *Switzerland*, ECtHR 20 January 2011, appl. no. 31322/07.
[104] *A., B. and C.* v. *Ireland*, ECtHR (GC) 16 December 2010, appl. no. 25579/05.
[105] *S.H. and others* v. *Austria*, ECtHR (GC) 3 November 2011, appl. no. 57813/00.
[106] *Christine Goodwin* v. *UK*, ECtHR (GC) 11 July 2002, appl. no. 28957/95
[107] See recently e.g. *Costa and Pavan* v. *Italy*, ECtHR 28 August 2012, appl. no. 54270/10 ; see classically also *Christine Goodwin* v. *UK*, ECtHR (GC) 11 July 2002, appl. no. 28957/95.
[108] E.g. *Mamatkulov and Askarov* v. *Turkey,* ECtHR (GC) 4 February 2005, appl. nos. 46827/99 & 46951/99; *Demir and Baykara* v. *Turkey*, ECtHR (GC) 12 November 2008, appl. no. 34503/97.
[109] E.g. *Opuz* v. *Turkey*, ECtHR 9 June 2009, appl. no. 33401/02.
[110] E.g. *Micallef* v. *Malta*, ECtHR (GC) 15 October 2009, appl. no. 17056/06; *Neulinger and Shuruk* v. *Switzerland*, ECtHR (GC) 6 July 2010, appl. no. 41615/07.
[111] See more extensively e.g. Senden, *supra* n. 101.

frequently stresses that the central aim and purpose of the Convention is to guarantee fundamental rights to individuals in a practical and effective manner.[112] It thereby frequently refers to the general objectives and fundamental principles underlying the Convention as a whole, such as notions of respect for human dignity, personal autonomy, democracy, the rule of law, and pluralism.[113] The protection of those values is central to the Convention system as a whole, as is clear from its preamble and from the Statute of the Council of Europe. Not surprisingly, therefore, the ECtHR strives to give a reading to the Convention rights that fits the underlying values of the Convention. The interpretative technique used in this regard has been termed 'meta-teleological interpretation'.[114] In applying this technique, the Court does not so much refer to the concrete aim of certain provisions of the Convention (as would be the case with 'teleological' interpretation), but rather to the wider, general purpose and objective of the Convention.[115] The use of meta-teleological interpretation fits well with the general requirements for treaty interpretation that have been defined in Article 31 of the Vienna Convention on the Law of Treaties, which stipulates that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[116] The meta-teleological interpretation gives shape to the notion of 'object and purpose', as the Court explicitly mentioned in *Soering v UK*:

> '87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms .... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective .... In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' ....'[117]

This consideration demonstrates that meta-teleological interpretation, consensus interpretation and evolutive interpretation are closely intertwined. In fact, they are different aspects of the same overall desire to do justice to the essential object of the Convention, i.e., to effectively protect individual fundamental rights and to guarantee a reasonable minimum level of protection of fundamental rights throughout the Council of Europe.

4.2.3 Autonomous interpretation

The Convention contains many notions and concepts that are also used in national constitutions and legislation, such as 'privacy', 'property', 'court' or 'marriage'. The precise legal meaning of such notions can differ in each individual legal system.[118] For example, what constitutes 'property' in Denmark can be different from what constitutes property in Greece, and while disciplinary proceedings may be conducted before a court in one state, they may not form part of the regular judicial system in

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[112] See already *Airey* v. *Ireland*, ECtHR 9 October 1979, appl. no. 6289/73, para. 24 and, more recently, *Mamatkulov & Askarov* v. *Turkey*, ECtHR (GC) 4 February 2005, appl. nos. 46827/99 and 46951/99. See more extensively Senden, *supra* n. 101, at p. 73.

[113] Cf. O. De Schutter and F. Tulkens, 'Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution', in E. Brems, ed., *Conflicts between Fundamental Rights* (Antwerp/Oxford/Portland, Intersentia 2008) pp. 169 at p. 214; F. Ost, 'The Original Canons of Interpretation of the European Court of Human Rights', in M. Delmas-Marty and Ch. Chodkiewicz, eds., *The European Convention for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1992), pp. 283-318, at p. 295; Senden, *supra* n. 101, at p. 199. For examples, see *Pretty* v. *UK*, ECtHR (GC) 29 April 2002, appl. no. 2346/02, para. 64 (reference to human dignity); *Jehovah's Witnesses of Moscow* v. *Russia*, ECtHR 10 June 2010, appl. no. 302/02 (reference to personal autonomy); *United Communist Party of Turkey* v. *Turkey*, ECtHR (GC) 30 January 1998, appl. no. 19392/92, para. 45 (reference to democracy).

[114] M. Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, OUP 2004).

[115] Cf. Senden, *supra* n. 101, at p. 204.

[116] See further on this, with references, Senden, *supra* n. 101, at p. 93.

[117] ECtHR 7 July 1989, appl. no. 14038/88.

[118] Cf. R. Bernhardt, 'Thoughts on the interpretation of human rights treaties', in R.St.J. Macdonald et al., eds., *The European System for the Protection of Human Rights* (Dordrecht, Martinus Nijhoff 1993) pp. 65-71 at p. 67.

another.[119] When interpreting or defining central Convention notions, the Court must choose between respecting the national meaning of such a notion, and adopting a European definition. The Court has stressed that a European, *autonomous* definition should usually prevail.[120] This is understandable from the perspective that the Convention should guarantee an equal level of protection for all states parties.[121]

In providing an autonomous interpretation to the Convention, the Court uses different methods of interpretation, varying from textual interpretation to consensus interpretation. In the latter situation, the Court searches for a greatest common denominator with respect to the notion that has to be defined and bases its own Convention definition on the interpretation thus found. Meta-teleological interpretation may also help in arriving at an autonomous reading: the Court will usually try to give an autonomous definition that fits well with the general principles and notions underlying the Convention. Indeed, the Court has expressly stated that the integrity of the objectives of the Convention would be endangered if the Court were to take the national level of protection, or the national definition of certain notions, as a point of departure for its own case law.[122] In particular, there would then be a risk that states would try to evade supervision by the Court by giving a narrow definition to terms and notions that determine the Convention's applicability.[123]

4.3 Strategic use of interpretative principles and methods of interpretation

The previous section has shown that the Court's development of interpretative principles and methods is mainly based on principled considerations regarding the role and function of the Convention. Besides this, the Court may have more strategic reasons to use such methods of interpretation. Consensus interpretation and autonomous interpretation, for example, allow the Court to demonstrate its willingness to take national law as guidance when interpreting important notions of the Convention, and thus to demonstrate its respect for what is accepted and acceptable at the national level.[124] Consensus interpretation may also enable the Court to arrive at (autonomous) definitions and interpretations that can be relatively easily implemented in national law, since definitions may be chosen that lie close to what is already known and accepted at the national level.[125] Furthermore, and perhaps more importantly, the ECtHR has traditionally been able to use consensus interpretation to respond to national concerns regarding the expansive protection of fundamental rights. In particular, as is further discussed below (section 4.5.2), it can refuse to give a new interpretation to the Conven-

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[119] See further Bernhardt 1993, *supra* n. 118, at p. 67.

[120] Cf. F. Sudre, 'Le recours aux 'notions autonomes'', in F. Sudre, ed., *L'interprétation de la Convention européenne des droits de l'homme* (Brussels, Bruylant 1998) p. 93 at p. 117; see also elaborately Senden, *supra* n. 101, at p. 177.

[121] F. Matscher, 'Methods of Interpretation of the Convention', in R.St.J. Macdonald et al., eds., *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1993) p. 63 at p. 73; Sudre, *supra* n. 120, at p. 94; Senden, *supra* n. 101, at p. 178 and, more elaborately, pp. 294-295.

[122] See e.g. *Engel and others* v. *the Netherlands*, ECtHR 8 June 1976, appl. nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, para. 81; *Chassagnou* v. *France*, ECtHR (GC) 29 April 1999, appl. no. 25088/94, para. 100. See also G. Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *European Journal of International Law* (2004) pp. 279-305 at pp. 282-283 and Senden, *supra* n. 101, at p. 298.

[123] Cf. Ost, *supra* n 113, at p. 306; Letsas 2004, *supra* n. 122, at pp. 282-283; Letsas 2007, *supra* n. 26, at p. 42; Senden, *supra* n. 101, at p. 178. See also the dissenting opinion of Judge Martens to the case of *Fischer* v. *Austria*, ECtHR 26 April 1995, appl. no. 16922/90, para. 9.

[124] Cf. P.G. Carozza, 'Propter Honoris Respectum: uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights', 73 *Notre Dame Law Review* (1998) p. 1217 at pp. 1226-1228; A.R. Mowbray, 'The Creativity of the European Court of Human Rights', 5 *Human Rights Law Review* 57 (2005) p. 69.

[125] For the EU, where a similar approach is used, see K. Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law', 52 *International and Comparative Law Quarterly* (2003) p. 873 at pp. 880-881. It is important to note, however, that this advantage will be a relative one – whether a definition will really fit in well with national law will depend on the level and the nature of the consensus and on the extent to which the meaning of a notion in the law of a specific member state already resembles the ECtHR definition. See also M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', 5 *European Constitutional Law Review* (2009) pp. 5-31 at p. 18.

tion due the absence of sufficient support in the law of the member states. In a few judgments it has even refused to give an autonomous reading altogether, leaving the definition of rights issues to be decided by the states. In such cases, the need to respect diversity and national legal traditions trumps the desire to provide a high level of protection. Using the method in this manner the Court may try to ward off accusations of activism[126] and it may display its willingness to do justice to the call for respect for national diversity in regard to sensitive fundamental rights issues.[127] Moreover, it can thereby respect the principle of subsidiarity and make the national authorities responsible for compliance with the Convention. Thus, such methods of interpretation are for the Court an important instrument to negotiate between the 'pull' and 'push' factors discussed in section 2, and to give expression to the notion of 'shared responsibility' for compliance with the Convention.

The same is true of meta-teleological interpretation. The Convention's general principles and objectives are very similar to principles that are mentioned in many national constitutional preambles or that find expression in national constitutional texts. By referring to such principles, the Court refers to a logical point of connection between the Convention and national constitutions, making it very clear that the Court respects such principles, rather than interferes with them.[128] Secondly, there is strong rhetorical force in the use of this method. If the Court closely connects any novel interpretation of Convention rights to the central values of the Convention, national authorities are almost obliged to agree with the reasonableness of such an interpretation. After all, since the national authorities have willingly and knowingly accepted the central aims and objectives by signing and ratifying the Convention, they logically also have to accept obligations and rights directly flowing from its central aims.[129]

4.4 Criticism

4.4.1 Meta-teleological interpretation and the risk of overreaching

Although there is great substantive and strategic value in the various principles and methods discussed above, the Court is frequently criticised for its use of these methods and the effects thereof. Indeed, there are some inherent risks for the Court in using precisely these methods. The pull towards practical and effective, evolutive protection of rights appears to be so great as to easily cause the Court to 'overreach'.[130] Referring to the aims and objectives of the Convention and the need for effective protection, for example, the ECtHR has imposed numerous positive obligations on the states to invest in the effective protection of fundamental rights, besides the classic negative obligations to refrain from interfering with these rights.[131] Although many of these obligations are very valuable

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[126] See e.g. Lenaerts, *supra* n. 125, at p. 879.

[127] Cf. Cartabia *supra* n. 125, at p. 20; see also Weiler 1999, *supra* n. 7, at 102.

[128] Cf. M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005) pp. 262-307 at pp. 290-291.

[129] On this, much has been written in relation to a similar approach employed by the Court of Justice of the EU; see e.g. U. Everling, 'Richterliche Rechtsfortbildung in der Europäischen Gemeinschaft', 55 *JuristenZeitung* (2000) pp. 217-227 at p. 223 and (though less explicit) E. Paunio and S. Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law', 16 *European Law Journal* (2010) pp. 395-416 at p. 412.

[130] See further Senden, *supra* n. 101, at p. 76. See also M. Burstein, 'The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights', 24 *Berkeley Journal of International Law* (2006) pp. 423-443 at p. 431; L.R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Review* (1997) p. 273 at p. 315; and, in relation to the EU, where similar problems exist, P. Craig, 'The ECJ and *ultra vires* action: a conceptual analysis', 48 *Common Market Law Review* (2011) pp. 395-437 at p. 397

[131] Originally, the Court found the basis for the positive obligations doctrine in Article 1 of the Convention in combination with the notion of effective protection; see e.g. *Marckx* v. *Belgium*, ECtHR 13 June 1979, appl. no. 6833/74, para. 31 and more recently and more explicitly: *Kontrová* v. *Slovakia*, ECtHR 31 May 2007, appl. no. 7510/04, para. 51. For a review of the kind of positive obligations accepted by the Court, see e.g. A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court on Human Rights* (Oxford, Hart 2004). For a more recent review as

and even essential in terms of respect for human dignity and democracy, such positive obligations have effected a great expansion of the Convention's scope. In this respect, the criticism has sometimes been raised that evolutive interpretation, however much supported by the Convention's aims and underlying principles, has made it very difficult for the states to foresee the obligations resulting from the Convention.[132] Moreover, meta-teleological and evolutive interpretation have led to accusations of activism and intrusion upon national sovereignty and national policy choices.[133]

Some of the more recent controversial of the Court's judgments evidently result from the Court's reference to the underlying principles of the Convention. Its acceptance of the overriding importance of the value of state neutrality in the case of *Lautsi* – which concerned the obligation to have crucifixes in classrooms of public primary schools in Italy – caused an outrage in many European states.[134] Surprisingly to some, perhaps including the Court, the comment was made that state neutrality should not imply interference with national culture and traditions.[135] Indeed, the Grand Chamber thought it wise in this case to stress the margin of appreciation in the states and to correct the Chamber's strongly meta-teleological interpretation of the Convention.[136] Likewise, the fact that the Court relied on the absolute value of the prohibition of torture in the case of *Othman (Abu Qatada)*, basing itself on the underlying values of the Convention system, did not convince those who would like to see terrorist convicts expelled or extradited to states where they risk torture or a flagrantly unfair trial in which there is a great likelihood that evidence will be used that has been obtained by torture.[137] Referring to the importance of the right to vote to guarantee a democratic state governed by the rule of law did not make the judgments in the *Hirst* and *Scoppola No. 3* cases more acceptable to the United Kingdom, where different views are held on participation in the government by those who have violated the basic rules of that same democracy.[138] And even in sensitive cases such as those relating to assisted suicide or abortion, where reactions to the Court's use of meta-teleological interpretation have been surprisingly mild, that is probably mainly due to the fact that the Court has compensated the widening of scope in these cases by allowing a wide margin of appreciation for restrictions.[139]

Clearly, thus, the 'magic' of relating new interpretations to central aims, principles and values of the Convention wears off easily and in the end may cease to convince the audience.[140] Moreover, it seems clear that the persuasive force of meta-teleological and evolutive interpretation is reduced if

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well as critical insight into the problems related to the doctrine (which are also concerned with overreaching), see D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London, Routledge 2012).

[132] This is true, in particular, of the cases in which the Court has decided that a state is responsible under the Convention for acts that have occurred before the Convention came into force in a respondent state. See in particular *Šilih* v. *Slovenia*, ECtHR (GC) 9 April 2009, 71463/01 and, more recently, *Janowiec and others* v. *Russia*, ECtHR 16 April 2012, appl. nos. 55508/07 and 29520/09. See critically on this Baroness Hale of Richmond, in: *What are the limits to the evolutive interpretation of the Convention?*, Dialogue between judges (European Court of Human Rights, Council of Europe 2011) pp. 11-18 at pp. 14-15.

[133] For this type of criticism, see in particular M. Bossuyt, 'Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations', 28 *Human Rights Law Journal* (2007) pp. 321-332 and M. Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers', *Inter-American and European Human Rights Journal* (2010) p. 47.

[134] ECtHR 3 March 2009, appl. no. 30814/06.

[135] For a discussion of the criticism, see in particular D. McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?', *Human Rights Law Review* (2011) pp. 451-502 and Piret, *supra* n. 25.

[136] ECtHR (GC) 18 March 2011, appl. no. 30814/06.

[137] *Othman (Abu Qatada)* v. *UK*, ECtHR ECtHR 17 January 2012, appl. no. 8139/09. See in particular the critical response by UK Prime Minister Cameron: http://www.number10.gov.uk/news/european-court-of-human-rights/.

[138] For the judgments, see *Hirst* v. *UK,* ECtHR (GC) 6 October 2005, appl. no. 74025/01and *Scoppola (No. 3)* v. *Italy*, ECtHR (GC) 22 May 2012, appl. no. 126/05. For a brief review of the debate in the UK, see *The Economist* 10 February 2011, 'Britain's mounting fury over sovereignty' (www.economist.com/blogs/bagehot/2011/02/prisoners_voting_rights); see also D. Nicol, 'Legitimacy of the Commons debate on prisoner voting', *Public Law* (2011) pp. 681-691; S. Briant, 'Dialogue, diplomacy and defiance: prisoners' voting rights at home and in Strasbourg', *Human Rights Law Review* (2011) pp. 247-249.

[139] See e.g. *A., B. and C.* v. *Ireland*, ECtHR (GC) 16 December 2010, nr. 25579/05; *Haas* v. *Switzerland*, ECtHR 20 January 2011, appl. no. 31322/07.

[140] Interestingly, the ECJ does not in fact always apply the method of meta-teleological reasoning, possibly precisely for this reason; see Craig, *supra* n. 130, at p. 399.

political and popular opinions on certain issues are deeply felt. References to underlying principles cannot compensate for the feeling that an outsider intrudes on national values and sentiments that are considered to be of great importance. In these cases, the pull factor of national sovereignty is very powerful and the Court should tread very carefully so as not to offend national views. If it makes strategic mistakes in this respect, and if it does do so too often, it may trigger sharp criticism and accusations of political case law and activism.

4.4.2 The disadvantages of consensus interpretation

Consensus interpretation may also be precarious from the perspective of legitimating the Court's interpretations. This type of interpretation is especially vulnerable if it is used to support an interpretation where there is no clear convergence of national law or if there is no clearly discernible common denominator.[141] The problems related to the method can be illustrated by an example of one of the contentious cases of the last years, *Demir and Baykara v Turkey*.[142] Central to this case was the question of whether the freedom of association – more specifically the right to become a member of a trade union – should apply to civil servants. A number of international treaties stipulated that this should be the case, and since these treaties had been ratified by nearly all member states of the Council of Europe, the Court found that there was sufficient consensus to support a new reading of Article 11 of the Convention. Accordingly, the provision was interpreted as meaning that all employees, including civil servants, have the right to be members of a trade union. The respondent state, however – Turkey – had expressly and deliberately refused to sign or ratify any of the relevant conventions and treaties, since it explicitly did not want its civil servants to have access to trade unions. This raised the question of whether the sole fact that most European states support a certain interpretation suffices to legitimise the imposition of such an interpretation on states that expressly reject that interpretation.[143] Such use of the consensus method might be interpreted as forcing a majority opinion on a minority, neglecting national particularities and national sovereignty, and changing the central rules of international treaty law.[144]

Legal scholars have pinpointed many other problems related to consensus interpretation.[145] It is clear, for instance, that legal comparisons are difficult to make, especially if one delves a little deeper than a perfunctory assessment of national constitutions or statutory provisions.[146] While consensus is easy to discover at a high level of abstraction, differences soon become visible if one has regard to more specific applications by the administration or by the courts. Moreover, even superficial and general reviews of the legal practice within the 47 states parties usually make it possible to trace as many similarities as differences, depending on the precise criterion chosen for comparison.[147] This

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[141] Cf. Lenaerts, *supra* n. 125, at p. 886, arguing that it is more likely that a judgment will be accepted if it is supported by closer convergence.

[142] *Demir and Baykara* v. *Turkey*, ECtHR (GC) 12 November 2008, appl. no. 34503/07.

[143] See the (Dutch language) case note of J.H. Gerards in *European Human Rights Cases* 2009/4, paras. 11 en 12. Cf. also Letsas 2004, *supra* n. 122, at p. 303, and S. Van Drooghenbroeck, 'Les frontières du droit et le temps juridique : la Cour européenne des droits de l'homme repousse les limites', 79 *Revue Trimestrielle des Droits de l'Homme* (2009) p. 811; they argue that the Court's approach would be more acceptable if it were fitted into a (meta-)teleological, moral argumentation; after all, it is then not so much the pure majority argument that counts, but rather the underlying reasons for adopting it. It is questionable, however, whether such an application can still be considered an example of purely consensus-based reasoning.

[144] D. Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe', 13 *Duke Journal of Comparative and International Law* (2003) p. 95 at p. 134.

[145] See e.g. Ost, *supra* n 113, at p. 307; L.R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 26 *Cornell International Law Journal* (1993) p. 133 at p. 140; Carozza, *supra* n. 124, at p. 1225; Senden, *supra* n. 101, at pp. 123 and 265-266.

[146] See e.g. K. Dzehtsariou, 'European Consensus: A way of reasoning', UCD Research Paper No. 11/2009, via http://ssrn.com/abstract=1411063.

[147] Cf. P. Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in G. Canivet, M. Andenas and D. Fairgrieve, eds., *Comparative Law Before the Courts* (BIICL 2004) p. 135 at p. 149.

may attract accusations of 'cherry picking': it is easy to blame the Court for finding precisely the type of consensus they need to support a certain desired outcome.[148] Such accusations are also sustained by another difficulty of the method, which is that it is very difficult to determine when exactly there is 'consensus'. Complete or true consensus rarely exists, except perhaps at a very high level of generality.[149] Hence, incomplete consensus or tendencies to convergence may suffice as a basis for common-ground interpretation, but there is then still uncertainty about the degree to which a predominant trend or uniform tendency really should be visible to warrant a new interpretation. All in all, it will be difficult for the Court to indicate with any precision why it has considered that a certain amount of agreement or disagreement can support a new interpretation of a fundamental right, or the recognition of a new aspect of a fundamental right. Such practical difficulties and the ensuing uncertainty threaten the legitimacy enhancing character of the method.[150]

4.4.4 The problems of autonomous interpretation

Finally, autonomous interpretation may result in some problems of its own. Autonomous determination of the meaning of central fundamental rights notions may create the perception that the Court is striving to empower itself, to the detriment of the states. In this respect, again, there is a risk of overreaching.[151] Although autonomous interpretations are essential from the perspective of uniform protection of fundamental rights, such interpretations may result in an expansion of the Convention's scope and, accordingly, a stronger role for the Court to decide on the reasonableness of national decisions and measures affecting fundamental rights. The wide and autonomous definition the Court has given to rights, such as the right to property, may serve to illustrate this risk.[152] As a result of its interpretative approach in these cases, the ECtHR can now decide on a wide variety of issues that many consider as reserved to national policy and decision making, such as inheritance law or social security and social benefit cases.[153] A frequently mentioned example in this context is the *Stec* case, in which the Court expressly used an autonomous interpretation to bring all social benefits, even those paid out of general taxation, within the scope of the right to property protected by Article 1 of the First Protocol to the Convention.[154] The consequence of this judgment, as well as of recent judgments in similar cases, is that typically 'national' policy domains such as immigration law, social security and housing are increasingly becoming Europeanised and national authorities seem to be losing their freedom to design their own policies in these domains.[155]

Moreover, autonomous definitions may cause legal problems, since 'European' definitions of certain notions may come to co-exist with national definitions of the same terms. As has been stressed in legal scholarship, this may lead to problems of fragmentation, inequality and legal uncertainty.[156] Moreover, the European definition may start from a different conception of a certain notion than that used at the national level, which may make it difficult for states to understand and implement the European conception in a logical manner.[157] Again, this may not contribute to the willingness of national authorities to implement the Court's case law in their own legislation, policies or case law.

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148 E.g. J.H. Gerards, 'Rechtsvinding door het Europees Hof voor de Rechten van de Mens', in T. Barkhuysen et al., eds., *55 Jaar EVRM, NJCM-Bulletin (special)* (2006) pp. 93-122.
149 Cf. Dzehtsariou, *supra* n. 146, at p. 2; Sudre, *supra* n. 120, at p. 123.
150 Cf. Carozza, *supra* n. 124, at p. 1231.
151 Cf. Senden, *supra* n. 101, at p. 183.
152 Cf. Bossuyt 2007, *supra* n. 133, p. 321-332; Sudre, *supra* n. 120, at p. 113.
153 On this, see Bossuyt 2007, *supra* n. 133, and Sudre, *supra* n. 120, at p. 113.
154 *Stec and Others* v. *UK*, ECtHR (GC), 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, paras. 49-53.
155 Particularly critical in this respect is Bossuyt 2007, *supra* n. 133; see more generally on the development M. Cousins, *The European Convention on Human Rights and Social Security Law* (Antwerp, Intersentia 2008) and K. Kapuy, 'Social Security and the European Convention on Human Rights: How an Odd Couple Has Become Presentable', 9 *European Journal of Social Security* (2007) pp. 221-241.
156 See in particular Cartabia, *supra* n. 125, at p.18.
157 See in particular Letsas 2007, *supra* n. 26, at pp. 51-53.

4.5 Towards shared responsibility?[158]

4.5.1 Introduction

Sections 4.3 and 4.4 demonstrated that the Court's interpretative principles and methods may be very useful tools in reducing tension between national sovereignty and effective Convention protection, but that they may sometimes backfire, especially if they are not applied with sufficient care. Interestingly, over the past ten years the Court seems to have developed two novel applications of consensus and autonomous interpretation that make these methods more suitable for application in a context of tension, and which fit well with the general desire to strive towards shared responsibility: first, the Court may deliberately opt for a non-autonomous approach, and secondly, the Court may connect the protection offered by the Convention to national law.[159] In both situations, an interpretation that is dependent on national law seems to be the starting point, rather than a purely 'European', uniform interpretation. Even though the Court's judges, according to the interviews conducted for this project, do not explicitly recognise these developments as 'new', or as consciously developed by the Court to deal with national sensitivities, it will be shown below that the Court may easily use them to this end.

4.5.2 Lack of consensus: deliberate choice of a non-autonomous approach

In several important cases the Court has accepted that there is such wide divergence within the Council of Europe on the meaning of certain notions that an autonomous definition is not warranted.[160] The best example of this is apparent from the Court's approach to the notion of 'person' contained in Article 2 of the Convention (right to life). In the case of *Vo* the question raised related to the moment from which a human being should qualify as a 'person' in the meaning of this provision.[161] According to some this should be from the moment of conception, while others have argued that the right should only apply from the moment of birth. In its judgment in *Vo*, the ECtHR expressly refused to resolve the issue, referring to the divergence of popular and scientific opinions within and between the European states. As a result of this refusal to give an autonomous reading, the states may give their own definitions of the notion. This means that the scope of application of Article 2 may differ from one European state to the other.[162] This may be difficult to accept from in terms of equality and uniformity, yet it is justifiable in that it respects national diversity on highly sensitive moral issues.

Although the *Vo* case may be regarded as a singular example, there are more cases in which the Court takes national diversity into account in defining Convention rights. In *Kimlya*, for example, the Court pointed out that, '[i]t is clearly not the Court's task to decide *in abstracto* whether or not a body of beliefs and related practices may be considered a 'religion' within the meaning of Article 9 of the Convention. In the absence of any European consensus ... the Court considers that it must rely on the

[158] This section is partly based on Gerards 2013, *supra* n. 35.

[159] Thirdly, it is clear that the Court does not use autonomous interpretation in respect to all provisions of the Convention. It is disputed, however, if this is intentional or incidental; the Court itself has not expressed reasons for this (see further Senden, *supra* n. 101, at pp. 180-181). For this reason, these 'silent' forms of non-autonomous interpretation are not discussed in this paper.

[160] No attention is paid here to the particular situation in which provisions of the ECHR expressly refer to national law, as in the case of Article 12; in such cases it would be neither logical nor appropriate for the Court to provide an autonomous definition, although it has stressed that even then it will 'police the borders' to see if a minimum level of protection is sufficiently guaranteed and the very essence of the right is not impaired – see *Parry* v. *UK*, ECtHR 28 November 2006 (dec.), appl. no. 42971/05.

[161] *Vo* v. *France*, ECtHR (GC) 8 July 2004, appl. no. 53924/00, paras. 82-85.

[162] See *Evans* v. *UK*, ECtHR 7 March 2006, appl. no. 6339/05, para. 46. This has been critically assessed by some; see e.g. T. Goldman, '*Vo v. France* and Fetal Rights: The Decision Not To Decide', 18 *Harvard Human Rights Law Journal* (2005) p. 277 at p. 279.

position of the domestic authorities in the matter and determine the applicability of Article 9 of the Convention accordingly'.[163] The Court did not offer an autonomous definition of 'religion' in this case, rather referring back to the national definition and determining the applicability of Article 9 on that basis. Similarly, in the case of *Boulois* the Grand Chamber recalled that, in determining whether Article 6 is applicable to the 'determination of civil rights and obligations', the starting point for its definition must be the provisions of the relevant domestic law and their interpretation by the domestic courts.[164] Even though in this case it carefully evaluated whether the national definition of a certain discretionary power could not be defined as a 'right' for the purposes of Article 6, it is clear that the definition in this case is a dependent rather than an autonomous one.[165]

Hence, even though autonomous interpretation can still be regarded as the 'gold standard' for the Court and recent case law, and the Court has reiterated the importance of such autonomous definitions for the protection offered by the Convention,[166] the judgments discussed in this section demonstrate that the Court sometimes may decide not to apply the method. By doing so it affords the national authorities great leeway to regulate the relevant topics as they think most appropriate, and to national judges to give their own interpretations of the Convention.

4.5.3 Dependency, or the 'in for a penny, in for a pound' approach

Another sign of care in the use of autonomous interpretation is visible in a rather new approach of the Court, which might be described as its 'in for a penny, in for a pound' approach.[167] An example may serve to illustrate this. The case of *E.B. v. France* concerned a conflict on the desire of a single, lesbian woman to adopt a child.[168] In a long line of cases the Court has given an autonomous reading to the notion of respect for family life, protected by Article 8 of the Convention, to the effect that this notion only covers established family life. The creation of a family, either through adoption or otherwise, does not come within the scope of the Convention. French legislation, however, did recognise a right to adoption and even a right to adoption for singles. In its judgment in *E.B.*, the Court's Grand Chamber held that *because* this right was recognised in French law, it should be guaranteed in conformity with the Convention. This implied, for example, that the right should be granted non-discriminatorily, which in this case meant that E.B.'s homosexuality ought not to have played a decisive role in the refusal of her adoption request. The protection of the Convention in this case clearly depended on the existence of a right recognised in national law. The Court has also applied this line of reasoning to social security law, extending the Convention's protection to 'those rights for which

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[163] *Kimlya and others* v. *Russia*, ECtHR 1 October 2009, appl. nos. 76836/01 and 32782/03, para. 79. See also Senden, *supra* n. 101, p. 296.

[164] *Boulois* v. *Luxemburg*, ECtHR (GC) 3 April 2012, appl. no. 37575/04, para. 91; for a similar example, see *Roche* v. *UK*, ECtHR (GC) 19 October 2005, appl. no. 32555/96, para. 120. Evidently, the Court also does not rely on an autonomous approach if the Convention expressly refers to national law, as is the case with Article 12 (right to marry); see in particular *Schalk and Kopf* v. *Austria*, ECtHR 24 June 2010, appl. no. 30141/04, para. 61.

[165] For a similar example in which the Court relied at least partly on national definitional elements, see *Vilho Eskelinen* v. *Finland*, ECtHR (GC) 19 April 2007, appl. no. 63235/00, para. 61 – here the Court gives a sort of 'semi-autonomous' interpretation. See further Senden, *supra* n. 101, p. 295.

[166] E.g. *Micallef* v. *Malta*, ECtHR (GC), judgment of 15 October 2009, appl. no. 17056/06.

[167] Although the Court often refers to older case law as a basis for the use of this approach (mostly only the *Belgian Linguistics* case (ECtHR 23 July 1968, appl. nos. 1474/62 and others)), it has only really developed this approach since the case of *Stec and Others* v. *UK*, where it was applied rather implicitly (ECtHR (GC), 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, in particular paras. 51 and 55). See further on this also (all in Dutch) R.A. Lawson, 'Boven het maaiveld. Over de "ruimhartige" toepassing van het EVRM door nationale rechters', in: T. Barkhuysen et al., eds., *Geschakeld recht. Verdere studies over Europese grondrechten ter gelegenheid van de 70ste verjaardag van prof. mr. E.A. Alkema* (Deventer, Kluwer 2009) pp. 307-323; the case-note of N.R. Koffeman to *Schalk and Kopf* v. *Austria*, *European Human Rights Cases* 2010/92; and Gerards 2011, *supra* n. 91, at pp. 58-62. Van de Heyning has also written on the topic, but she has connected it more closely to Article 53 ECHR; see *supra* n. 34 at p. 191.

[168] *E.B.* v. *France*, ECtHR (GC) 22 January 2008, appl. no. 43546/02.

the State has voluntarily decided to provide',[169] and to cases concerning sensitive issues such as abortion[170] or special provisions for cohabiting partners[171]

The 'in for a penny, in for a pound' approach does not reflect an autonomous interpretation of the Convention, but evidently relies on an approach that depends on national law. This may result in differences in the scope and level of protection between the various states parties, especially where some states have created and recognised many more rights than others. On the other hand, it fits well with a perspective of shared responsibility between the states and the Court for compliance with the Convention. By signing and ratifying the Convention, the states have agreed to respect the fundamental rights contained therein for all of their acts.[172] It would be hard to deny, then, that such rights are applicable to all government measures and policies that fall within the general scope of the Convention, regardless of whether the Convention itself imposes an obligation on the state to provide certain rights. It would be impossible to reconcile such selective applicability of the prohibition of discrimination, the right to an effective remedy or the right to a fair trial with the primary obligation of the states under Article 1 of the Convention to respect fundamental rights.[173] The 'in for a penny, in for a pound' approach builds on this by simply requiring the state to accept the consequences of regulating a matter that touches on fundamental rights.[174] Simultaneously, it allows the Court to supervise the compliance with Convention rights, thus enabling it to strive for a reasonable level of protection of Convention rights in all states. Thus, the method reconciles the desire for national sovereignty (states may decide, after all, *not* to provide certain rights or benefits) and the need to safeguard fundamental rights

4.6 Conclusion

This aim of this section was to highlight the Court's use of evolutive and autonomous interpretation, employing such methods as consensus and meta-teleological interpretation to arrive at interpretations that protect Convention rights in a practical and effective manner, while respecting national legal traditions and national constitutional values. It has been demonstrated that these methods and principles are well chosen from the perspective of fulfilling the main functions of the Court, but if they are not carefully applied they may easily backfire. Much of the criticism levelled at the Court is

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169 See e.g. *Moskal* v. *Poland*, ECtHR 15 September 2009, appl. no. 10373/05, para. 38; *Carson* v. *UK*, ECtHR (GC) 16 March 2010, appl. no. 42184/04, para. 63; *Andrle* v. *Czech Republic*, ECtHR 17 February 2011, appl. no. 6268/08; *B.* v. *UK*, ECtHR 14 February 2012, appl. no. 36571/06.

170 E.g. *Tysiac* v. *Poland*, ECtHR 20 March 2007, appl. no. 5410/03 and *R.R.* v. *Poland*, ECtHR 26 May 2011, appl. no. 27617/04.

171 E.g. *P.B. and J.S.* v. *Austria*, ECtHR 22 July 2010, appl. no. 18984/02, para. 33.

172 In the *Belgian Linguistics* case (ECtHR 23 July 1968, appl. nos. 1474/62 and others), the Court gave the following arguments for an approach such as is now commonly followed by the Court: '… persons subject to the jurisdiction of a Contracting State cannot draw from Article 2 of the Protocol the right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14. ... To recall a further example ... Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14 ..., were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions. In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14. It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms. No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations ...'.

173 The Court confirmed in *G.R.* v. *the Netherlands* that the right to an effective remedy '… guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order' (ECtHR 10 January 2012, appl. no. 22251/07, para. 44).

174 In a rather similar vein, the Court has sometimes held that States that have set certain standards for fundamental rights protection can be required under the Convention to respect their own standards, even if they may not be standards that the Convention itself has set – see e.g. *Orchowski* v. *Poland*, ECtHR 22 October 2009, appl. no. 17885/04, para. 123 and *M.S.S.* v. *Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 250.

inspired by judgments in which consensus interpretation, autonomous interpretation or meta-teleological interpretation play a significant role. The magic of referring to underlying values seems to have worn off and it has become obvious that consensus interpretation may be equivalent to 'cherry picking'. Thus, there is a need for the Court to tread carefully and avoid overreaching.

Interestingly, however, over the past fifteen years, the Court has started to develop some new applications of its 'classical' methods that seem to be more in line with the notion of shared responsibility between the Court and the states to safeguard fundamental rights. The Court has made it clear that a lack of consensus may sometimes imply that no autonomous interpretation is adopted, thereby accepting that national authorities (including national courts) give their own interpretations. In other cases, it has done no more than connect the Convention's protection to rights already and voluntarily provided and protected by national authorities. Thus, even if the Court still adheres to its main principles of evolutive and autonomous interpretation, it sometimes gives room to the states to protect the Convention in their own way. Seen in terms of the desire to treat national authorities as allies in the project of protecting the Convention, these are important and interesting developments, which could help reduce the tension between the Court and the national authorities. For that reason it is regrettable that they have remained relatively invisible in analyses of the Court's case law.

5. Procedural review and 'judicial minimalism'

5.1 Introduction – substantive review and the need for a response

The previous section discussed the use of 'classical' methods of interpreting the Convention and their development and use by the Court. Much of the current criticism of its legitimacy is expressly related to the application of these methods and the corresponding expansion of the Convention, as well as increased control by the Court. There is much more to be said about the legal argumentation of the ECtHR, however. In interpreting and applying the Convention in pursuance of the aims described in section 2 above, the Court has always shown great awareness of the difficulties of its supranational and subsidiary position and it has developed several techniques that are particularly helpful in positioning itself. The two judicial techniques used most frequently in this respect are procedural review and 'judicial minimalism', i.e., the choice of 'narrow' and 'shallow' reasoning. These methods help the Court to avoid profound, substantive and moral choices in sensitive issues and delicate cases, and they also prevent it from exercising a role as a 'court of fourth instance'. Moreover, they are useful to the Court if it is internally divided over certain cases, e.g., because some judges would like to go further than others (offering more protection to fundamental rights).

This section discusses the capacity of these two mechanisms to reduce the tension between the supranational and the national level and the way the Court can use them to empower the national courts and facilitate their co-responsibility for the protection of Convention rights. The downside of the use of both methods is also discussed: the Court sometimes uses the techniques in such a way that they attract national criticism and are at odds with the achievement of the Convention's main objectives.

5.2 Procedural review

5.2.1 Advantages of the use of procedural review

Instead of assessing the substantive reasons provided by the states in justification of an interference with a fundamental right, the Court increasingly focuses on the quality and transparency of the national procedures and judicial remedies that have been used in relation to the disputed decision or

rule.[175] One first variant of this technique of 'procedural review' focuses on the national procedures for decision making or legislation. If it is clear that a decision or rule is prepared and adopted with the greatest care and after extensive deliberation, in an open or transparent decision making process, the Court will quite readily accept the conformity of such a decision or rule with the Convention. It will then simply accept that sound decision making procedures usually result in acceptable and permissible outcomes. An example of this is visible in the case of *Maurice*,[176] which related to the very sensitive and complex issue of compensation in cases of wrongful birth. The applicants argued that the relevant legislation, the *Loi Perruche*, violated their rights under Article 8 of the Convention because it offered a generally lower level of compensation than they could have obtained under the former case law of the French courts. In its judgment in the case the Court paid close attention to the quality of the process that had led to the adoption of the *Loi Perruche*. It stressed that there had been a 'stormy nation-wide debate' on the issue, in which politicians, interest groups and individuals had participated, and that close attention had been paid to all relevant legal, ethical and social considerations. It concluded that '... there is no serious reason for the Court to declare contrary to Article 8 ... the way in which the French legislature dealt with the problem or the content of the specific measures taken to that end'.[177] The Court did not address the substantive issues of reasonableness and proportionality of the interference, rather restricting its review to purely procedural matters.

By contrast, in the case of *Hirst*,[178] the Court found it problematic that the British parliament had never expressly and extensively deliberated on the choice to exclude all prisoners (regardless of the duration of their sentence or the nature of the crimes committed) from the right to vote. It seemed that, regardless of the substantive reasons for and against such a complete, blanket prohibition, the Court would not have accepted the legislation for the lack of procedural safeguards surrounding its adoption.[179] Again, thus, the Court (at least partly) avoided a substantive assessment of the reasonableness of the exclusion of prisoners by relying on procedural arguments.

A second variant of the Court's procedural approach is visible in relation to national judicial remedies. There are many cases in which disagreement and conflict about the outcome is not so much related to the proper interpretation of fundamental rights, as to different views on the weight of the interests concerned and the way they should be balanced. Cases of defamation and the publication of photographs are notorious examples: if there is a conflict between the right to reputation and the right to freedom of expression, the weight accorded to the various interests determines the outcome, but views on what the appropriate weight should be almost unavoidably differ.[180] Moreover, in some cases the 'better placed' argument is of particular importance.[181] Cases relating to family law matters, such as care orders and visiting rights, or immigration cases, such as cases relating to expulsion, often involve evaluations of facts and weighing of interests. In such cases, national authorities often have more direct access to evidence and expert opinions and they may be in a better position to

[175] This section is loosely based on Gerards 2011, *supra* n. 91, section 2.8.
[176] *Maurice* v. *France*, ECtHR (GC) 6 October 2005, appl. no. 11810/03.
[177] *Maurice*, para. 124.
[178] *Hirst (No. 2)* v. *UK*, ECtHR (GC) 6 October 2005, appl. no. 74025/01.
[179] This is apparent in particular from the following considerations: 'As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. ... [I]t cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote. It is also evident from the judgment of the Divisional Court that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was generally seen as a matter for Parliament and not for the national courts. The court did not, therefore, undertake any assessment of proportionality of the measure itself. ...' (*Hirst (No. 2)* v. *UK*, ECtHR (GC) 6 October 2005, appl. no. 74025/01, paras. 79-80).
[180] See also S. Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict', 26 *American University International Law Review* (2010) pp. 183-236.
[181] On this argument, see section 2.3.

gauge the possible consequences of a certain decision. In such cases, the Court increasingly does not give its own opinion on the balance to be struck between the interests concerned. Instead, it checks whether sufficient procedural guarantees have been offered and whether the national courts have respected all the requirements of a fair trial.[182] In particular, the Court requires that they apply the Convention standards as developed in the Court's case law. If the national courts have done so, this means that the Court will not readily overturn their decisions for substantive reasons, as it made clear in the case of *Von Hannover (No. 2)*:

> 'Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.'[183]

Although the Court still re-assessed the facts and interests at stake in the case, it is clear that this method of procedural review may help the Court to avoid the type of criticism related to substantive review.[184] Moreover, it can help it to limit the number of applications relating to these 'fine-tuning' issues, as this case law makes clear that they can just as well be resolved at the national level.[185]

The Court's procedural case law also shows its willingness to follow national judicial interpretations of the Convention that are based on national (constitutional) law provisions that correspond with Convention's provisions. This is readily apparent from the case of *Urban and Urban*,[186] where the Polish constitutional court had found the regulations for 'assessors', a type of quasi-independent judges, to be in violation of the Polish constitution. The Polish government disagreed with this finding and tried to entice the ECtHR to find that the Convention did not require the high level of protection of the right to an independent court that was set by the Polish constitutional court. The ECtHR disagreed:

> '51. ... [T]he Court observes that in constitutional complaint proceedings the Constitutional Court has no jurisdiction to review the compatibility of legislation with international agreements, including the Convention ... The important consideration for this Court is that the Constitutional Court found that the manner in which Poland had legislated for the status of assessors was deficient since it lacked the guarantees of independence required under Article 45 § 1 of the Constitution, guarantees which are substantively identical to those under Article 6 § 1 of the Convention. It would be justified for the Court to reach a contrary conclusion only if it was satisfied that the national court has misinterpreted or misapplied the Convention provision or the Court's jurisprudence under that provision or reached a conclusion which was manifestly ill-founded.'

This shows that the Court will be reluctant to rectify a national interpretation of the Convention if the national constitutional court has made a clear effort to take the Court's jurisprudence into account.[187] In fact, it will only do so if the national court's interpretation is clearly in violation of the ECtHR's own

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[182] For some recent examples, see *Kopf and Liberda* v. *Austria*, ECtHR 17 January 2012, appl. no. 1598/06 (visiting rights); *Y.C.* v. *UK*, ECtHR 13 March 2012, appl. no. 4547/10 (placement order); *Ahrens* v. *Germany*, ECtHR 22 March 2012, appl. no. 45071/09 (paternity); *Stübing* v. *Germany*, ECtHR 12 April 2012, appl. no. 43547/08 (sexual relation between siblings); *Nacic and others* v. *Sweden*, ECtHR 15 May 2012, appl. no. 16567/10 (expulsion). For older examples, see e.g. *Olsson (No. 2)* v. *Sweden*, ECtHR 27 November 1992, appl. no. 13441/87; *Hokkanen* v. *Finland,* ECtHR 23 September 1994, appl. no. 19823/92; *Haase and others* v. *Germany,* ECtHR 12 February 2008 (dec.), appl. no. 34499/04; *Koons* v. *Italy* (ECtHR 30 September 2008, appl. no. 68183/01 (visiting rights)).

[183] *Von Hannover No. 2* v. *Germany*, ECtHR (GC) 7 February 2012, appl. nos. 40660/08 60641/08, para. 107; for earlier examples, see e.g. *Hacquemand* v. *France* (ECtHR 30 June 2009 (dec.), appl. no. 17215/06); *White* v. *Sweden*, ECtHR 19 September 2006, appl. no. 42435/02; *Balsyte-Lideikiene* v. *Lithuania*, ECtHR 4 November 2008, appl. no. 72596/01; *Aksu* v. *Turkey*, ECtHR 15 March 2012, appl. nos. 4149/04 and 41029/04; *MGN Limited* v. *UK*, ECtHR 12 June 2012, appl. no. 39401/04. On this, see also Tulkens 2012, *supra* n. 14, at p. 9.

[184] See also Gerards 2012, *supra* n. 81, at pp. 173-202.

[185] Cf. Keller and Stone Sweet 2008, *supra* n. 81, at p. 700.

[186] ECtHR 30 November 2010, appl. no. 23614/08.

[187] See also Van de Heyning, *supra* n. 34, p. 209.

interpretation. This is true even if the Court's interpretation is not directly based on the Convention, but rather on national constitutional law, as long as the Court's case law is taken into account.

The other way round, the Court actually requires that national procedures meet the demands of fairness, transparency and openness. If a judicial procedure lacked equality of arms, if a national decision was insufficiently reasoned, or if investigations into a possible violation were insufficiently expeditious and independent, the Court may find a violation of substantive provisions of the Convention, even if the shortcomings were primarily procedural in nature.[188] Requirements of a fair trial (Article 6 ECHR) or an effective remedy (Article 13) are frequently incorporated and translated into positive obligations on the government.[189] By meeting such procedural requirements the states can more easily comply with their primary obligation to protect the Convention rights, which would imply that the Court would have to intervene less often in the future. By adopting such a procedural approach, the Court therefore clearly expresses the notion of shared responsibility.[190]

5.2.2 Going too far?

Regardless of the great advantages of procedural review from the perspective of enhancing shared responsibility for compliance with the Convention, there are some significant difficulties related to the particular use of this form of review by the Court. This is already apparent from the case of *Hirst (No. 2)*, which is one of the most contentious cases of all time and which appears to lie at the heart of the recent British criticism of the Court.[191] Clearly, relying on procedural review did not help the Court to arrive at a persuasive and acceptable decision. This may have to do with one particular element of the case, which is the criticism the Court levelled at the British choice of a blanket rule that was to be applied indiscriminately to all prisoners. The Court not only criticised the limited discussions in parliament that preceded the adoption of this blanket rule, as mentioned above; it also rejected the very idea of adopting blanket rules in this type of case. It held that legal classifications, especially if legislation interfered with fundamental rights, should be as precise as possible and should be proportionate to the aim pursued. If legislation is overly broad or over-inclusive, excluding a very large and indeterminate group from exercising a fundamental right, this is not acceptable. In the later case of *Frödl* the Court stressed this even more strongly, actually requiring individual judicial review in all cases where prisoners were excluded from the right to vote:

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[188] For some examples, see *Sayoud* v. *France,* ECtHR 26 July 2007, appl. no. 70456/01, paras. 22-24; *Lombardi Vallauri* v. *Italy*, ECtHR 20 October 2009, appl. no. 39128/05, paras. 52-55; *Fatullayev* v. *Azerbaijan*, ECtHR 22 April 2010, appl. no. 40984/07, para. 124; *Sapan* v. *Turkey*, ECtHR 8 June 2010, appl. no. 44102/04, paras. 38-40; *Özpinar* v. *Turkey*, ECtHR 19 October 2010, appl. no. 20999/04, paras. 77-78.

[189] For some examples, see e.g. *Grosaru* v. *Romania*, ECtHR 2 March 2010, appl. no. 78039/01, para. 47 and, more recently, *G.R.* v. *the Netherlands*, ECtHR 10 January 2012, appl. no. 22251/07; *Szerdahelyi* v. *Hungary*, ECtHR 17 January 2012, appl. no. 30385/07; *I.M.* v. *France*, ECtHR 2 February 2012, appl. no. 9152/09; *Y.C.* v. *UK*, ECtHR 13 March 2012, appl. no. 4547/10; *K.A.B.* v. *Spain*, ECtHR 10 April 2012, appl. no. 59819/08; *Plesó* v. *Hungary*, ECtHR 2 October 2012, appl. no. 41242/08; *Singh and others* v. *Belgium*, ECtHR 2 October 2012, appl. no. 33210/11.

[190] See also L. Wildhaber, 'A Constitutional Future for the European Court of Human Rights?', 23 *Human Rights Law Journal* (2002) p. 161 at p. 162.

[191] *Hirst (No. 2)* v. *UK*, ECtHR (GC) 6 October 2005, appl. no. 74025/01. For a short overview of the debate, see *The Economist* 10 februari 2011, 'Britain's mounting fury over sovereignty' (www.economist.com/blogs/bagehot/2011/02/prisoners_voting_rights). After the most recent Grand Chamber judgment in *Scoppola*, the following quote from the Prime Minister's Question Time in the House of Commons (23 May 2012) may illustrate the current British government's attitude to the Court: 'Nigel Dodds MP: Will the PM give an undertaking that he will not succumb to the Diktat from the European Court of Human Rights in relation to prisoners' voting, that he will stand up for the resolution that was passed in this House by an overwhelming majority, and that he will stand up for the sovereignty of this House and the British people? David Cameron MP (Prime Minister): Well the short answer to that is Yes. I have always believed that when you are sent to prison you lose certain rights, and one of those rights is the right to vote. And crucially I believe this should be a matter for Parliament to decide, not a foreign court. Parliament has made its decision and I completely agree with it.' See also http://www.guardian.co.uk/law/2012/may/23/uk-resist-prisoners-vote-european-court and http://www.independent.co.uk/news/uk/politics/david-cameron-to-fight-prison-voting-plan-7781521.html. See also Nicol 2011, *supra* n. 138, at pp. 247-249.

> '33. As regards the conditions for disenfranchisement set out in section 22 of the National Assembly Election Act, the Court finds that the provision in question is more detailed than the ones applicable in *Hirst* …. It does not apply automatically to all prisoners irrespective of the length of their sentence and irrespective of the nature or gravity of their offence, but restricts disenfranchisement to a more narrowly defined group of persons since it applies only in the case of a prison sentence exceeding one year and only to convictions for offences committed with intent.
> 34. Nevertheless, the Court agrees with the applicant that section 22 of the National Assembly Election Act does not meet all the criteria established in *Hirst* … . Under the *Hirst* test, besides ruling out automatic and blanket restrictions it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions ….
> 35. The essential purpose of these criteria is to establish disenfranchisement as an exception even in the case of convicted prisoners, ensuring that such a measure is accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary, taking the above elements into account. …'[192]

The Court here appeared to require individual court judgments in each and every case of prisoner disenfranchisement, rather than the application of a general rule, even if such a general rule differentiated between different groups of prisoners according to the type of offence or the duration of their sentences. There are many more situations in which the Court has expressly asked for such an individualised form of decision making by the Courts.[193] Especially in the area of family law,[194] the Court has stressed time and again that legislative presumptions are problematic and should be replaced by particularised judicial decision making.[195] A case in point is *Schneider*,[196] which related to a legal presumption that the mother's husband is the legal father of the child, even if another man claims to be the biological father and even if he has recognised the child. According to the Court such general legal presumptions are untenable in present day conditions:

> '100. … Having regard to the realities of family life in the 21st century …, the Court is not convinced that the best interest of children living with their legal father but having a different biological father can be truly determined by a general legal assumption. Consideration of what lies in the best interest of the child concerned is, however, of paramount importance in every case of this kind …. Having regard to the great variety of family situations possibly concerned, the Court therefore considers that a fair balancing of the rights of all persons involved necessitates an examination of the particular circumstances of the case.'[197]

Thus, the Court seems to depart from a general presumption that individualised judicial decision making is to be favoured over legislative rules in which classifications are made to which a certain legal regime applies.[198] Exceptions to this general presumption are visible mainly in those cases where moral issues are at stake and legal certainty would seem to prevail over individual justice,[199]

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192 *Frödl* v. *Austria*, ECtHR 8 April 2010, appl. no. 20201/04.
193 See also Stone Sweet 2012, *supra* n. 10, at p. 1863. For a few examples, see *Dickson* v. *UK*, ECtHR (GC) 4 December 2007, appl. no. 44362/04; *Kubaszewski* v. *Poland,* ECtHR 2 February 2010, appl. no. 571/04; *M.D. and others* v. *Malta*, ECtHR 17 July 2012, appl. no. 64791/10; *Godelli* v. *Italy*, ECtHR 25 September 2012, appl. no. 33783/09.
194 But certainly not limited to that – see e.g. *Bjedov* v. *Croatia*, ECtHR 29 May 2012, appl. no. 42150/09, a case that related to the occupation of a social tenancy flat.
195 Moreover, other demands have been made which the states may find difficult to meet; in the case of *C.A.S. and C.S.* v. *Romania*, for example, the Court found that there is a positive obligation on the state to provide counselling and psychological assistance to a child that has fallen victim to violence (ECtHR 20 March 2012, appl. no. 26692/05).
196 ECtHR 15 September 2011, appl. no. 17080/07
197 For similar examples, see *M.D. and others* v. *Malta*, ECtHR 17 July 2012, appl. no. 64791/10 and *Godelli* v. *Italy*, ECtHR 25 September 2012, appl. no. 33783/09.
198 See also *Ādamsons* v. *Latvia*, ECtHR 24 June 2008, appl. no. 3669/03.
199 See e.g. *Evans* v. *UK*, ECtHR (GC) 10 April 2007, appl. no. 6339/05; in this case, it turned out that all decisions that could be taken in an individual cases would harm the interests of another individual, making general legislation just as arbitrary as individual decision making, but more certain and predictable nonetheless; for a similar example, see *S.H. and others* v. *Austria*, ECtHR (GC) 3 November 2011, appl. no. 57813/00; on this, see also J. Bomhoff and L. Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights', 2 *European Constitutional Law Review* (2006) p. 424 at pp. 429-430 and (in Dutch) J.H. Gerards, 'Concrete redelijkheidstoetsing en de rechtspraak van het EHRM. Over "mandatory rules", individuele gerechtigheid en de eisen die het Hof stelt aan de nationale rechtstoepassing', in T. Barkhuysen et al., eds., *Geschakeld recht.*

or in cases concerning social security and planning issues.[200] Indeed, the Court's desire for proportionality review by national courts may beneficial to its own position, since in such cases it can easily defer to the national courts and rely on their protection of fundamental rights.[201] Nevertheless, as the responses to the *Hirst* sequel neatly illustrate, the Court's desire for individual justice may be at odds with national constitutional values and national legal traditions.[202] The choice of rules and legislation rather than individual and particularised decision making may be inspired by a strong constitutional tradition favouring the sovereignty of parliament and formalist values such as legal certainty, predictability and transparency.[203] Although much can be said in favour of non-formalist values such as flexibility, openness and individual balancing, it is difficult to maintain in general that individualised decision making should always prevail over legislative rules and formalism. If that is true, it is certainly understandable that states in which sovereignty of parliament is very important and in which judicial review of legislation, or judicial ad hoc balancing, are disfavoured, find it difficult to accept that a supranational court would dictate a constitutional approach that is contrary to their own.[204] In trying to impose judicial individualised decision making, and especially in trying to do so in the case of the United Kingdom, the Court seemed to overreach. Trying to achieve a high level of fundamental rights protection while disregarding national constitutional values simply will not do – if anything, it will lead to reluctance at the national level to accept and implement the ensuing Strasbourg judgments.

5.2.3 The Court's response

Although the Court is reluctant to respond directly to national political criticism (see below , section 7), it is sensitive to comments on its judicial approach and it takes them to heart in subsequent judgments. A clear example of this is the case of *Scoppola No. 3*, which again related to the issue of prisoners' voting rights.[205] This case, which was brought against Italy, was different from the case of *Hirst*[206] to the extent that some differentiation was visible in the relevant legislation. The legislation distinguished between two different groups of prisoners; prisoners with a sentence of less than three years were deprived of the right to vote for five years, prisoners with longer sentences completely lost their right to vote. Except for this differentiation there was no room for individualised judicial decision making on disenfranchisement – the Italian courts simply had to apply the legislative rules. If the Court were to decide on this case in line with *Frödl* and the aforementioned general requirement of individualised proportionality review, it would have to find that this did not meet the requirement for individualisation defined in that case.[207] Instead, the Court held that the legislation disclosed a sufficient amount of differentiation to meet the test of *Hirst*. Criticising the Chamber's findings in the *Frödl* case, it considered that:

> '99. … the *Hirst* judgment makes no explicit mention of the intervention of a judge among the essential criteria for determining the proportionality of a disenfranchisement measure. The relevant criteria relate solely to whether the measure is applicable generally, automatically and indiscriminately within the mean-

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Verdere studies over Europese grondrechten ter gelegenheid van de 70ste verjaardag van Prof. mr. E.A. Alkema (Deventer, Kluwer 2009) pp. 169-188. However, the case law is not entirely consistent here; see e.g. *Dickson* v. *UK*, ECtHR (GC) 4 December 2007, appl. no. 44362/04.

200 See e.g. *Twizell* v. *UK*, ECtHR 20 May 2008, appl. no. 25379/02; *Maggio and others* v. *Italy*, ECtHR 31 May 2011, appl. no. 46286/09 and others.

201 See above, section 5.2.1 and see Keller and Stone Sweet 2008, *supra* n. 81, at p. 701.

202 See extensively on this (in Dutch) Gerards 2009, *supra* n. 199, pp. 169-188.

203 Gerards 2009, *supra* n. 199; see also Gerards 2012, *supra* n. 81, at p. 199.

204 On this, see also Keller and Stone Sweet 2008, *supra* n. 81, at p. 695, explaining that the strong demands the Court has made in relation to criminal procedure have sometimes proved difficult to digest for the states.

205 *Scoppola (No. 3)* v. *Italy*, ECtHR (GC) 22 May 2012, appl. no 126/05.

206 *Hirst (No. 2)* v. *UK*, ECtHR (GC) 6 October 2005, appl. no. 74025/01.

207 See *Frödl* v. *Austria*, ECtHR 8 April 2010, appl. no. 20201/04.

> ing indicated by the Court …. While the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed.'

Recalling that the arrangements for restricting prisoners' voting rights vary considerably from one national legal system to one another, the Court then stressed that the states should be free to adopt legislation on the matter in accordance with historical development, cultural diversity and political thought within Europe. It continued, emphasising that

> '102. … [i]n particular, … the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction.'

Although it is difficult to know whether this reasoning is a direct response to the criticism of the Court's preference for individualised decision making, it is obvious that the Grand Chamber's judgment heeds the differences in national constitutional traditions and accepts that some states will favour legislation and formalism over individualised judicial balancing. It even leaves a very wide margin of discretion to the states to decide on this, though it ends its considerations by stressing that it would remain competent to decide if national legislation would be sufficiently precise, proportionate and differentiated to meet the Convention's requirements.

Although the Court does not seem to have followed this new approach in all of its cases – there are still some recent examples of cases in which it has obliged states to introduce individual judicial decision-making in family law cases –,[208] it seems to be true that it has adequately responded to national criticism and strives to find an adequate balance between the need to respect national diversity and the need to afford effective protection to individual rights.

5.2.4 Conclusion

The aim of this section was to highlight the Court's use of procedural review as an alternative to substantive review of justifications and substantive balancing. Procedural review can help the Court to avoid having to take a moral stand on delicate and controversial matters, such as compensation for wrongful birth or consent requirements in IVF cases. Moreover, in cases where views on the reasonable outcome of a case may often conflict, such as cases of defamation or immigration law, procedural review may equally help the Court to avoid taking sides. In both types of situation, the use of procedural review is clearly in accordance with the principle of primarity, which holds that it is up to the states to regulate and decide matters in accordance with the Convention. Procedural review also helps the Court avoid exercising the role of a 'court of fourth instance'. Usually, after all, no renewed assessment of the facts and interests is needed if the Court needs only to determine whether sufficient procedural safeguards were present and if the contested decision or measure has come into being as a result of transparent, open and fair decision making procedures.

Given the growing importance of procedural review, it is understandable that the Court has also translated such review into obligations and requirements of a procedural nature – it needs procedural standards for its own assessment and it has to make clear to the states what thresholds of procedural fairness must be set. Nonetheless, the Court sometimes seems to go too far in defining such standards, as in the situation of requiring individualised decision making by the national courts. It is

[208] Some examples have been given above; see in particular *Godelli* v. *Italy*, ECtHR 25 September 2012, appl. no. 33783/09.

for good reason that this requirement has been criticised and the Court seems to have taken due note. According to the *Scoppola No. 3* judgment of the Grand Chamber, particularised decision making is not always needed, even though the ECHR standards should always be respected.

5.3 Judicial minimalism: shallow, narrow and analogical reasoning

5.3.1 Introduction

The second interpretative device discussed in this section is not often mentioned in the literature on the Court's methods of interpretation, nor has the Court expressly referred to it. Looking at the Court's case law, however, it is clear that 'judicial minimalism' plays an important role, and has done so for a very long time. This section analyses the Court's *de facto* use of 'shallow' and 'narrow' reasoning, i.e., reasoning based on superficial arguments, and reasoning that is strictly limited to the facts of the case at issue. The discussion thereby goes into how the Court can use this device to its own benefit, i.e., to manoeuvre between the requirements of effective protection of fundamental rights and respect for national constitutional values and national diversity, as well as to reduce tension within the Court itself. Attention is also paid to the disadvantages of judicial minimalism, which can be found in general values such as the certainty and predictability of the Court's judgments.

5.3.2 Shallow reasoning

The notion of 'judicial minimalism' was coined by Cass Sunstein.[209] He explained that it is often difficult for courts deciding on sensitive cases to provide 'deep' and 'wide' reasoning. In controversial fundamental rights cases, people can sometimes agree on a rather abstract or 'shallow' level that a certain fundamental right exists and should be respected, even if they have different opinions on the underlying reasons and arguments. In such a situation, a court such as the ECtHR could try different approaches to justify its choice of a certain reading of a fundamental right. On the one hand, it might underpin its finding by referring to 'deep', moral, highly principled arguments. Given the diversity of opinions of people on such arguments, the judgment might then be difficult to accept for some. On the other hand, the Court may rely on 'shallow' reasoning, limiting itself to superficial remarks on the general importance of a certain right in light of the underlying principles of the Convention or developments in Europe, while leaving fundamental issues undecided and trusting the general acceptance of a certain abstract definition.[210] The judgment may then be acceptable and convincing, even if it does not provide much clarity as to its underlying reasons, precisely because no real debate on such reasons can ensue from the judgment.[211]

The Court uses shallow reasoning in many of its cases.[212] Good examples are visible in relation to the application of the classical methods referred to above: in applying evolutive interpretation the Court usually restricts itself to very general, abstract references to accepted values such as human dignity or democracy, to European consensus or to international standards, rather than to detailed moral arguments and presumptions.[213] In some cases, the Court even merely presents the outcome

[209] C.R. Sunstein, *Legal Reasoning and Political Conflict* (New York/Oxford, OUP 1996) pp. 4-5.
[210] Cf. also H.-M. ten Napel and F. Theissen, 'The European Court of Human Rights' Jurisprudence on Religious Symbols in Public Institutions In Comparative Perspective: Maximum Protection Of The Freedom Of Religion Through Judicial Minimalism?', in S. Ferrari and R. Christofori, eds., *Law and Religion in the 21st Century* (Farnham, Ashgate) pp. 313-322 at p. 315.
[211] Sunstein 1996, *supra* n. 209, at pp. 4-5.
[212] See also S. Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights', 23 *Oxford Journal of Legal Studies* (2003) pp. 405-433 at p. 407; Mowbray 2005, *supra* n. 124, at p. 61. For the difference between 'shallowness' and 'hollowness', see C.R. Sunstein, 'Beyond Judicial Minimalism', Harvard University Law School Public Law & Legal Theory Research Paper No. 08-40 (2008), http://ssrn.com/abstract=1274200 at pp. 5 and 8.
[213] See e.g. *Demir and Baykara* v. *Turkey*, ECtHR (GC) 12 November 2008, appl. no. 34503/97; *Bayatyan* v. *Armenia*, ECtHR (GC) 7 July 2011, appl. no. 23459/03. Many cases in which the Court refers to 'classic' methods of interpretation, such as

of its deliberations without providing any detailed argumentation.[214] In addition, the Court seldom offers a broad definition based on high-level principles. It usually builds on previous case law, drawing together small pieces of argumentation that it has previously provided, and combining them into a set of general principles or criteria.[215] Although the result of this approach may be a rather 'deep' definition, the Court tends to stress that this is the unavoidable outcome of small definitional steps taken in previous cases.[216] Mostly, moreover, the definitions are given at such a high level of abstraction and generality that it would be difficult to disagree with them.[217]

Interestingly, the Court can also use this approach to 'repair' mistakes of 'deep' reasoning in earlier judgments if it appears that the deep reasoning had indeed divided the audience. A case in point is the Chamber judgment in the *Lautsi* case concerning crucifixes in public schools.[218] The Chamber underpinned its findings in this case on rather deep, moral and principled grounds, clearly favouring principles of state neutrality and secularism, rather than by reference to earlier case law. It is well known that the Chamber judgment led to a stormy European debate on whether the Court actually could take such a strongly moral position and simply discard national traditions and national culture.[219] The case was sent to the Grand Chamber and it may come as no surprise that the Grand Chamber corrected the deep approach, replacing it by a shallow one that was reasoned on the basis of careful references to national traditions, the margin of appreciation doctrine, and previous judg-

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textual interpretation or systematic interpretation may also be regarded as shallow to the extent that such methods allow the Court to escape from the need to provide substantive, moral arguments. These cases are not discussed in detail in this paper; for a good example, however, see *Pretty* v. *UK*, ECtHR 29 April 2002, appl. no. 2346/02.

[214] See e.g. *Von Hannover (no. 2)* v. *Germany*, ECtHR (GC) 7 February 2012, appl. nos. 40660/08 and 60641/08, in which the Court found the right to respect for one's private life to be applicable to photos in the following brief consideration: '96. Regarding photos, the Court has stated that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof (see *Reklos and Davourlis* v. *Greece*, cited above, § 40).' Perhaps one might expect that a fuller account of the arguments for the applicability could found in *Reklos and Davourlis* v. *Greece*, ECtHR 15 January 2009, appl. no. 1234/05, but the paragraph referred to is virtually identical to the one in *Von Hannover*. This seems to match Sunstein's 'constructive use of silence' to avoid conflict over the outcomes (Sunstein 1996, *supra* n. 209, at p. 39).

[215] See e.g. *United Macedonian Organisation Ilinden and Others* v. *Bulgaria (No. 2)*, ECtHR 18 October 2011, appl. no. 34960/04, where the Court provided a rather strong and general formulation of the notion of pluralism, which was based on a reference to a previous case (*United Macedonian Organisation Ilinden and Others* v. *Bulgaria*, 19 January 2006, appl. no. 59491/00), where it referred back to *Gorzelik* v. *Poland*, ECtHR (GC) 17 February 2004, appl. no. 44158/98, paras. 89-93), in which the Court defined pluralism mainly by reference to what it has held in earlier case law. This is what Sunstein has described as 'conceptual ascent', 'in which the more or less isolated and small low-level principle is finally made part of a more general theory' (Sunstein 2008, *supra* n. 212, at p. 17).

[216] Various scholars have remarked that most definitions of central notions, such as 'democracy' or 'human dignity' are rather 'thin' or hollow, being limited to largely formalistic and minimalist requirements; cf. for democracy: S. Marks, 'The European Convention on Human Rights and its 'Democratic Society'', 66 *British Yearbook of International Law* (1995) pp. 209-238 at 231-234; Greer 2003, *supra* n. 212, at p. 200 and for human dignity: C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 19 *European Journal of International Law* (2008) pp. 655-724. Some do not agree, however: Ten Napel finds that the combination between the notions of democracy and pluralism in the Court's case law results in a rather 'thick, inclusive conception of democracy' (H.-M. ten Napel, 'The European Court of Human Rights and Political Rights: The Need for More Guidance', 5 *European Constitutional Law Review* (2009) pp. 464-480 at p. 465); this still is the result, however, of a 'conceptual ascent', rather than of a wide and deep definition in one individual judgment. Moreover, Ten Napel has conceded that much of the Court's case law is not in line with this thick concept, but sets only minimal requirements with respect to internal constitutional relations (*idem* at 479).

[217] Not surprisingly, the definitions given by the Court are criticised because of their vagueness and multi-interpretability – see e.g. A.J. Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights', 5 *European Constitutional Law Review* (2007) pp. 367-384 at pp. 383-384. A good example of an interpretation that is not supported by deep arguments, but that is still persuasive because of the high level of agreement on an abstract level is *Jalloh* v. *Germany*, ECtHR (GC) 11 July 2006, appl. no. 54810/00, where the Court held that the use of evidence obtained by torture always renders a trial unfair (para. 105).

[218] *Lautsi* v. *Italy*, ECtHR 3 November 2009, appl. no. 30814/06.

[219] For a discussion of the debate, see McGoldrick 2011, *supra* n. 135, at p. 470 and Piret 2012, *supra* n. 25.

ments of the Court.[220] Indeed, the general meta-principles on which the Chamber had based its judgments no longer found a place in the Grand Chamber's judgment. Moreover, it is difficult to discern on the basis of the Grand Chamber's judgment how subsequent cases concerning religious expressions in public places will be decided, which is certainly a hallmark of judicial minimalism.

'Shallow' judicial minimalist reasoning, based on precedent and references to external factors (such as European consensus) thus usually forms the basis for the Court's approach, rather than deep, moral and principled arguments.[221] The advantage of this in pluralist Europe is that the Court can maintain a relatively high standard of protection without having to take sides on deeply felt controversies or delicate and sensitive fundamental rights issues. Indeed, it is obvious that the Court may run into trouble if it forgets this and bases its reasoning on deeply principled arguments – in a very diverse Europe, this may clearly lead to difficulties of acceptance, of which the Court has to take careful account.

5.3.3 Narrow reasoning, analogical reasoning and general principles

Following Sunstein's argument, it is also advisable for the Court to limit its interpretations to the bare facts of the cases presented to it, rather than provide a general interpretation of the Convention. Such 'narrow' interpretations can easily be understood from the facts of the case and may therefore be rather acceptable to the Court's audience. On the other hand, 'wide' interpretations, or the establishment of general interpretative criteria, may attract strong criticism if they are not generally agreed. Another great advantage of a line of reasoning that is closely geared to the individual facts of the case is that it does not set too strong a precedent. Thus, if it were to appear that a certain judgment is hard to digest for the states, or that hindsight shows it was wrongly decided, subsequent cases can be easily distinguished on the facts and a different line of reasoning can be adopted. Finally, 'narrow' judgments can have the advantage that all judges within a Chamber or Grand Chamber agree on them. Especially if a case were to require an extension of previous case law, or if there is substantive disagreement on the appropriate balance that should have been struck between competing interests, the judges may disagree on the line that should be adopted. Especially as a 'narrow' judgment hardly sets a precedent and does not create widely applicable standards, the judges may agree on such a judgment much more easily than if the judgment had far-reaching consequences for decision making in a range of similar cases.

It is not surprising, therefore, that the Court's interpretations are usually closely aligned to the facts of the individual case, even though there are many examples of cases in which the Court has given a general definition of autonomous Convention notions.[222] Usually the Court does not even give a real definition of the right at issue. In many of its cases, especially in more recent years, it simply provides a overview of previous case law in which it has recognised certain aspects of rights being protected by the Convention. Subsequently it holds that a similar issue is (or is not) at stake in the present case and that, accordingly, the Convention right applies (or not).[223] Indeed, even though this manner of

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[220] *Lautsi* v. *Italy*, ECtHR (GC) 18 March 2011, appl. no. 30814/06, in particular para. 68, where the Court expressly referred to the lack of a European consensus to justify a wide margin of appreciation and to justify that it did not opt for a substantive argumentation based on state neutrality or secularism.
[221] Some have severely criticized the Court for using this approach, instead of some form of moral reasoning; see in particular Letsas 2007, *supra* n. 26, at pp. 123-126.
[222] See already Ress, *supra* n. 29, at pp. 719-744. For the exceptions, see in particular the sections in this report on autonomous decision-making and evolutive interpretation (4.2.1 and 4.2.3).
[223] For an empirical study of the extent to which the Court grounds its judgments in precedent in order to legitimise its judgments, see Y. Lupu and E. Voeten, 'Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights', APSA 2010 Annual Meeting Paper, http://ssrn.com/abstract=1643839.

reasoning is usually not presented as a specific argumentative approach, stating general principles and applying them to the individual case is now the Court's prevailing argumentative approach.

But there is more to the Court's minimalism than narrow, fact-based reasoning. Interestingly, the case law of the Court discloses a very frequent use of analogical reasoning, even if commentators hardly ever seem to notice this interpretative technique and the Court does not refer to it explicitly.[224] Nevertheless, it is evident that Court actually decides most cases by comparing the facts of the case before it to the facts of cases that it has decided previously, looking for analogies, similarities and differences.[225] In some cases, it finds that the similarities are sufficiently clear to justify extending a certain line of case law or a certain interpretation to a new, slightly different set of facts. In other cases, there may be a reason to distinguish the facts of the case, stopping the development of the case law in a certain direction.[226] In all such cases there is no need to provide profound theoretical or substantive arguments for the new approach.[227] Pointing to similarities in facts and arguments and referring to previous judgments provides sufficient justification for reaching a certain outcome.[228] It is here too that the second 'supranational' advantage of narrow decision making is visible: not only does this technique have the advantage that profound moral arguments can be avoided, it also limits the precedential value of judgments. Accordingly, as mentioned above, if reactions to a certain judgment seem to make it clear that the Court has overreached and an extension of a line of case law is difficult for certain states to digest, the Court may just as easily in a subsequent case make it clear that the previous judgment was based on a very particular set of facts and no similar judgment is called for in other cases.[229]

One possible disadvantage of 'narrow' reasoning is the lack of predictability and legal certainty in which it results; indeed, entirely particularised decision making may result in arbitrariness. The Court avoids this in part by relying on the strongly precedent-based approach mentioned above, which allows it to develop consistent, relatively predictable lines of case law. Moreover, since searching for analogies is very similar to searching for common principles and elements in the Court's own case law, the Court's approach may even help to clarify the general meaning of the Convention rights. If a line of case law is sufficiently clearly established, the Court can distil the common elements and criteria that it has used to decide on such cases and it can reformulate them in the shape of 'general principles derived from the Court's case law'.[230] In some situations, lines of case law are drawn together by the Grand Chamber, which may use previous case law as a basis to draw up authoritative lists of general criteria which may subsequently be used by the Court (as well as national courts) to

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[224] Cf. Sunstein 1996, *supra* n. 209, at p. 32: 'Analogical reasoning is the key to legal casuistry'.
[225] Cf. Sunstein 1996, *supra* n. 209, at p. 65.
[226] For an example in the Court's case law, see the case of *Vajnai* v. *Hungary*, ECtHR 8 July 2008, appl. no. 33629/06, para. 49), where the Court distinguished the case (which concerned a prohibition of the wearing of a communist red star) from a previous case on limitations of freedom of expression in Hungary (*Rekvényi* v. *Hungary*, ECtHR 20 May 1999, appl. no. 25390/94), holding that in the current case and after twenty years of democracy, it was no longer necessary to allow Hungary additional leeway to combat the danger to democracy that might be constituted by certain forms of speech.
[227] Sunstein 1996, *supra* n. 209, at p. 68.
[228] Sunstein 1996, *supra* n. 209, at pp. 67-68.
[229] Apparently, this occurred after the case of *Nunez* v. *Norway*, ECtHR 28 June 2011, appl. no. 55597/09, in which the Court had given a rather lenient interpretation of Article 8 in a case concerning the extradition of an illegal immigrant with a minor child. This was carefully distinguished from in the more recent case of *Antwi* v. *Norway,* ECtHR 14 February 2012, appl. no. 26940/10, paras. 100-101. *In* doing so, the Court implicitly made it clear that the approach in *Nunez* will be strictly limited to a very narrow set of factual circumstances, making the case far less relevant as a precedent.
[230] Cf. Ress, *supra* n. 29, at p. 726. This can be done since, as Sunstein notes, 'analogical reasoning cannot proceed without identification of a governing idea – a principle, a standard, or a rule – to account for the result in the source and target cases' (Sunstein 1996, *supra* n. 209, at p. 65).

determine the applicability of the Convention.[231] These principles and criteria may serve as standards or yardsticks to be applied by the Court as well as national authorities, doing justice to the Court's task to 'elucidate, safeguard and develop the rules instituted by the Convention'.[232] A good example is the case of *Ananyev*, where the Grand Chamber, on the basis of a large number of previous judgments, defined a list of standards to be applied to determine whether prison conditions transgress the 'minimum level of severity' of the prohibition of inhuman and degrading treatment.[233] Such lists of standards, which the Court by now provides in almost all of its judgments, may help to create the reassuring impression that the Court's decision making is based on a transparent set of well-established, coherent general principles.

5.3.4 Disadvantages of judicial minimalism

Although judicial minimalism has the obvious advantage of flexibility, it clearly also has some drawbacks.[234] Perhaps the most important problem is that there is no clarity as to the final aim of analogical reasoning. If each individual case is decided on its own facts, without a clear sense of direction, the Court may sometimes end up by having to provide a rather general interpretation that is difficult for the states to digest.[235] An additional disadvantage is that it can take a long time before it becomes clear what the general principles for applicability of a certain Convention provision really are.[236] This may result in a lack of transparency as well as in uncertainty and confusion.[237] For example, in the Grand Chamber case of *Gillberg*, the question that arose was whether the right to freedom of expression also covers a 'negative' aspect, i.e., a right to refuse to make certain information available.[238] Although the Grand Chamber admitted that previous case law on the issue was scarce and did not give an answer to this question, it opted for a narrow approach, mentioning that '[t]he Court does not rule out that a negative right to freedom of expression is protected under Article 10 of the Convention, but finds that this issue should be properly addressed in the circumstances of a given case'.[239] From the judgment it appears that no such negative right was accepted, but it will require many more cases to determine when a negative right can be recognised.[240] If the Court had provided a gen-

[231] For a recent example, see *Kotov* v. *Russia*, ECtHR (GC) 3 April 2012, appl. no. 54522/00, paras. 92-107, where the Court, on the basis of earlier case law, formulated a list of criteria to be taken into account in determining if someone has acted as a private person or a State agent.
[232] See recently *Konstantin Markin* v. *Russia*, ECtHR (GC) 22 March 2012, appl. no. 30078/06, para 89, in which the Court also stresses that '[a]lthough the primary purpose of the Convention is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States …'. As was mentioned in the previous subsection, the Court may even arrive at a rather wide and deep interpretation of the Convention using this approach in the form of 'conceptual ascent', i.e. by bringing small definitional steps of a substantive nature together in the shape of a wider set of general starting points for the Court's review. For the value of this approach to the legitimacy of the Court, see Lupu and Voeten 2010, *supra* n. 223, at p. 6.
[233] *Ananyev and Others* v. *Russia*, ECtHR (GC) 10 January 2012, appl. nos. 42525/07 and 60800/08, paras. 141-159.
[234] For a general overview, see e.g. Sunstein 1996, *supra* n. 209, at pp. 72-74.
[235] Cf. Sunstein 2008, *supra* n. 212, at p. 2: 'Minimalism might be easiest in the short-run, but in the long-run, it can be extremely destructive'. See also Gerards 2012, *supra* n. 81.
[236] Cf. Ten Napel and Theissen, *supra* n. 210, at p. 316, arguing that this may be a reason why the Court has not yet developed a satisfactory philosophy to underpin its judgments on freedom of religion.
[237] Cf. Sunstein 2008, *supra* n. 212, at p. 14. The Court's judges have sometimes also noted this risk – see e.g. the dissenting opinion of Judge Martens in the case of *Fischer* v. *Austria*, ECtHR 26 April 1995, appl. no. 16922/90, para. 16. Another risk was pointed out by Ress, who mentioned that states may be less willing to implement the Strasbourg case law if they are led to believe that each judgment is solely applicable to the particular facts of the case presented and does not set a generally applicable precedent (Ress, *supra* n. 29, at p. 722).
[238] *Gillberg* v. *Sweden*, ECtHR (GC) 3 April 2012, appl. no. 41723/06.
[239] *Idem*, para. 86.
[240] There are more recent Grand Chamber cases in which the Court gives a rather narrow judgment that is closely aligned to the facts of the case at issue, even though all of them contain at least some arguments that are of more general applicability. See e.g. *Kononov* v. *Latvia*, ECtHR (GC) 17 May 2010, appl. no. 36376/04; *Taxquet* v. *Belgium*, ECtHR (GC) 16 November 2010, appl. no. 926/05; *Perdigao* v. *Portugal*, ECtHR (GC) 16 November 2011, appl. no. 24768/06; *Giuliani and Gaggio* v. *Italy*,

eral definition of the right based on substantive criteria, albeit shallowly reasoned, it would have provided national authorities with a stronger foundation on which to base their own Convention case law.[241] Moreover, some scholars have argued that the need for such clear and general judgments has become even greater over the last decade. In the context of a large, heterogeneous group of states, the Court should sometimes take on a 'pedagogical role', rather than one limited to case-based decision making.[242] The Court thus carefully needs to weigh the advantages of minimalist decision making against the desire for general principles and clear criteria.

5.4 Conclusion

This section has shown that the Court often uses of two important judicial techniques that are not frequently discussed in the academic literature and that do not belong to the typical 'Convention canon' of interpretation methods. Nevertheless, it is obvious that the Court can benefit from the use of both techniques when searching for an adequate balance between respecting national sovereignty and protecting human rights, and from the viewpoint of shared responsibility. The method of procedural review serves to avoid the need for substantive decision making by the Court. Instead, the Court bases its judgments on the quality of national decision making processes, and procedural remedies and safeguards. By stressing the need for procedural justice and safeguards, as well as by respecting the outcome of careful national decision making, the Court can give clear expression to the notion of subsidiarity. The method therefore seems ideally suited to enhance shared responsibility and stress the primarity of national decision making. Nevertheless, the reactions to some of the Court's judgments show that procedural review does not always work and states can feel offended by its application. Thus, as was concluded for the methods discussed in section 4, it is important that the Court should avoid overreaching when applying procedural review.

Further, this section has shown that the Court often relies on 'judicial minimalism' by consistently using shallow, narrow or analogical reasoning. It also has been demonstrated that judicial minimalism, just like procedural review, is an important, useful tool to search for shared responsibility and striking a good balance between fundamental rights protection and subsidiarity. This is more so now that clarity and consistency in the Court's interpretations are safeguarded by identifying 'general principles' that can be derived from its case law. Nevertheless, especially in cases where clarity and generality of interpretation are needed, as is often the case where novel questions arise regarding the scope of the Convention, the Court may prefer to base its judgment on general criteria and substantive arguments, rather than on an analogical approach or an analysis of the facts of the case at issue. Argumentation based on meta-teleological or consensus reasoning is to be welcomed in such landmark cases, even if narrow and analogical argumentation may be preferred in many other cases.

ECtHR (GC) 24 March 2011, appl. no. 23458/02; *Palomo Sanchez and Others* v. *Spain*, ECtHR (GC) 12 September 2011, appl. no. 28955/06.

[241] Concerning the desirability of such guidance, see e.g. E.A. Alkema, 'The European Convention as a Constitution and its Court as a Constitutional Court', in P. Mahoney et al., eds., *Protecting Human Rights: The European Perspective – Studies in Memory of Rolv Ryssdal* (Cologne/Berlin/Bonn/Munich, Carl Heymans 2000) pp. 41-63 at p. 60 and D. Nicol, 'Lessons from Luxembourg: federalisation and the Court of Human Rights', 26 *European Law Review – Human Rights Survey* (2001) p. HR/9; see also Judge Martens' dissenting opinion in the case of *Fischer* v. *Austria*, ECtHR 26 April 1995, appl. no. 16922/90, para. 16) and his dissenting opinion in *Fey* v. *Austria*, ECtHR 24 February 1993, appl. no. 14396/88, para. 1. For criticism of the Court's current approach, see B. Hale, '*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?', 12 *Human Rights Law Review* (2012) pp. 65-78 at p. 68.

[242] R. Harmsen, 'The European Convention on Human Rights after Enlargement', *International Journal of Human Rights* (2001) pp. 18-43; Greer 2003, *supra* n. 212, at p. 407; M. Eudes, *La Pratique Judiciaire Interne de la Cour Européenne des Droits de l'Homme* (Paris, Editions A. Pedone 2005) p. 292.

6. Judicial dialogue

6.1 Introduction

In section 3.5 it was explained that the Court regards the protection of Convention rights as a shared responsibility or a partnership between itself and the national courts. The Court supervises compliance with the Convention and protects fundamental rights in the last resort, yet it is up to the national courts to guarantee protection of the Convention rights in the first place. The previous sections have shown that the Court may be quite demanding in this respect. The national courts are asked to adopt the Court's autonomous and evolutive definitions of Convention rights and apply them in their own case law. If they do not do so, or lack the competence to set aside national legislation, the state may be held accountable for a violation of the Convention. By copying the Court's interpretative approach, the national courts can avoid the occurrence of such violations. Viewed in terms of the Convention's overall objective, which is to arrive at an adequate level of protection of fundamental rights throughout Europe, this is clearly desirable. It has also been shown that the Court has used its argumentative tools in such a way that national (judicial) choices are respected. By using procedural review, judicial minimalism and interpretations that depend on national law, the Court expressly endorses the value of national compliance with the Convention and stresses the subsidiary character of its own supervisory task. Indeed, the Court often shows lenience and expresses its approval if the national courts have fulfilled their obligations, accepting a substantive outcome rather than re-balancing the interests at issue.

This situation of shared responsibility between the states (the national courts in particular) and the Court is often expressed in terms of constitutional or judicial 'dialogue'.[243] The notion of dialogue was originally developed to analyse the relationship between national constitutional courts and the national legislature ('constitutional dialogue'),[244] but it has also been used to describe contacts between highest national courts; between national courts of different states; between national courts and the EU Court of Justice; between various international courts and supervisory bodies; etc.[245] The notion of dialogue is also used to describe a wide variety of 'contacts' and interaction. It may relate to strictly regulated constitutional procedures between courts and parliament (such as the possibility of a 'constitutional override' in Canada or the 'declaration of incompatibility' in the United Kingdom); to mechanisms that can be used to deal with diversity in pluralist legal systems (such as the 'margin of appreciation' doctrine); and even to informal forms of exchange of 'good practices'.[246] In fact, the notion of dialogue is so wide as to cover virtually all forms of interplay and interaction between courts *inter se* or between courts and other institutions.[247]

Precisely because of the very wide meaning of the 'judicial dialogue' notion, it may not appear to be a very useful tool to analyse the relationship between the ECtHR and the national courts. Nonetheless, the notion may help us understand the importance of procedures and mechanisms that inform the states' (in particular the national courts') implementation of the Convention. The Court's pilot judgment procedure, for example, has been construed as having many elements of dialogue, both between the Court and the national authorities (including national courts) and between the Court and the Council of Europe's Committee of Ministers, and even between the Committee of Ministers and the states. Likewise, the doctrine of the margin of appreciation, the method of procedural review

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[243] See e.g. Bratza 2011, *supra* n. 82, at p. 511; Bratza 2012, *supra* n. 82, at pp. 26-27; Tulkens 2012, *supra* n. 14, at p. 8; Lübbe-Wolf, *supra* n. 81, at p. 11.

[244] Particularly influential is P. Hogg and A. Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't a Bad Thing after All', 35 *Osgoode Hall Law Journal* (1997) p. 75.

[245] See below, section 6.2.1.

[246] See e.g. Slaughter 1994, *supra* n. 81, at pp. 99-137; Gerards 2011, *supra* n. 26. See also M. Claes et al., eds., *Constitutional Conversations in Europe* (Antwerp, Intersentia 2012).

[247] For a good review of different dialogue theories and claims, see Torres Pérez, *supra* n. 86, at p. 106.

and judicial minimalism, and the reliance on comparative arguments and national case law can all be construed in terms of facilitating dialogue and interaction between the states and the Court.

Nevertheless, such a broad analysis of judicial dialogue would not be very useful in the light of the objectives of this report. Many of the Court's mechanisms and procedures involve only relatively indirect forms of dialogue; others have already been well analysed and charted in different studies. For that reason, this section focuses on a limited number of direct forms of judicial dialogue, which were mentioned in interviews with the Court's judges and registrars as important examples of interaction between national courts and the ECtHR, and which have remained relatively understudied. First, attention is paid to dialogue by means of case law, in which the Court by means of its own judgments expressly responds to national judgments, and vice versa. Secondly, attention is paid to informal and formal procedures for dialogue, including the envisaged system of advisory opinions.

6.2 Dialogue by means of judgments

6.2.1 Some background: constitutional dialogue and dialogue between courts

In many national constitutional systems, constitutional or highest courts lack the competence or willingness to set aside acts of parliament because of incompatibility with the national constitution. Given their position in the constitutional system as a whole, and their specific legitimacy in relation to that of the legislature, constitutional and highest courts often restrict themselves to expressing clear criticism of the legislature on a certain piece of legislation, rather than using powers such as setting aside legislation or even declaring legislation null and void. After such judgments, it is up to the legislature to respond to the criticism, e.g., by amending or replacing a piece of legislation.[248] If amendments have been made, but only to a limited extent, this may trigger new cases to be brought before the courts, which will then have to pronounce judgment on the compatibility of the new legislation with fundamental rights provisions. It is said that this process constitutes some kind of 'dialogue' between the highest court and the legislature: the court speaks, the legislature replies, and this might go one until the moment arrives that both the court and the legislature are content with the outcome.[249] The so-called 'declaration of incompatibility' in the United Kingdom is a very good example of such a dialogue.[250] Here, the Supreme Court may find that an act of parliament is contrary to the Human Rights Act, yet such an incompatibility can only be removed by parliament itself. In its judgment the Supreme Court will have to set out the problems and flaws of the act very clearly in order to enable parliament to remove the violation, thus stimulating a response by the legislature.[251] In quite a different way, the Canadian Supreme Court may find a violation of the constitution in an act of parliament, but then parliament may decide that the legislative provision shall operate nonetheless.[252] Although the legislature seldom uses this power of 'legislative override', it appears that the courts are more careful in their own approach towards legislation, deferring to the legislature more

[248] Cf. L.B. Tremblay, 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures', 3 *International Journal of Constitutional Law* (2005) pp. 617-648 at p. 623.
[249] See e.g. R. Dixon, 'Weak-Form Judicial Review and American Exceptionalism', 32 *Oxford Journal of Legal Studies* (2012) pp. 487-506 at p. 496.
[250] See Section 4 of the UK Human Rights Act 1998.
[251] On the dialogical quality of the 'declaration of incompatibility' and other mechanisms contained in the Human Rights Act 1998, see in more detail e.g. T.R. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998', *Public Law* (2005) pp. 306-335 and A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press 2009) pp. 128 and 408.
[252] See Section 33 (1) of the Canadian Charter of Rights and Freedoms, the so-called 'notwithstanding' clause. Similar provisions can be found in other Commonwealth countries, such as Australia and New Zealand. For a review, see Dixon 2012, *supra* n. 249, at p. 490.

frequently, especially if the legislature, in one way or another, has responded to an earlier judgment in which a conflict with fundamental rights was found.[253]

In both examples, there is genuine interaction between the highest court and parliament, based on an explicit finding of a fundamental rights problem in an act of parliament. The highest court explains where the problems are located and the legislature responds. It has been argued that there is great value in such forms of constitutional dialogue and they are to be preferred over 'strong' forms of judicial review, which imply that the court really has the final say and that the legislature is simply bound to follow the court's judgment.[254] Dialogical constitutional systems do justice to democratic legitimacy and they are said to encourage a keen judicial eye for flaws in the legislative process, which may lead to improvement of the overall quality and legitimacy of the outcomes.[255]
Of course, such a dialogue between parliament and the judiciary is difficult to envisage in respect of the ECtHR, as there is no legislative counterpart that could act as its interlocutor. Nevertheless, dialogue theory has proved sufficiently flexible to extend to inter-judicial relations, including relations between national and supranational or international courts.[256] The main characteristic of dialogue then is that it is avoids any court having the final say, but the courts respect each other's position and, by means of their judgments, try to arrive at outcomes that are acceptable to both levels.[257] Acceptance of judicial dialogue may prevent the occurrence of situations of real conflict between national and European courts and thereby help to reduce the tension described in section 2.5. The notion of dialogue thus fits well with the general notion of shared responsibility.

Effective dialogue presupposes the existence and use of judicial instruments that can be used to bolster the cooperation and voluntary acceptance of interpretations and findings by both national courts and the ECtHR. As has been shown in sections 4 and 5, the instruments developed and commonly used by the ECtHR can in principle foster effective dialogue, even if such methods have some advantages and risks.[258] Interestingly, however, besides the use of such 'dialogical' methods and techniques of argumentation, several examples can be found in the Court's case law of even more articulated use of the possibilities of judicial dialogue, or rather of dialogue by means of judgments. This section highlights two particular examples: the express response by the Court to criticism and concerns expressed in national case law (section 6.2.2), and the express acceptance of changes in case law that have been made in response to one of the Court's judgments (section 6.2.3).

6.2.2 Dialogue at the ECtHR: response to criticism and concerns expressed in domestic judgments

Especially in recent years the Court has encountered clear criticisms of its case law in the judgments of national (highest) courts. Perhaps the best example of this relates to the use of hearsay evidence or evidence obtained from absent witnesses who cannot be questioned in criminal proceedings.[259] In

[253] Cf. Dixon 2012, *supra* n. 249.
[254] For this notion, see in particular M.V. Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries', 38 *Wake Forest Law Review* (2003) pp. 813-838.
[255] On the value of dialogue-based systems, see e.g. Hogg and Bushell, *supra* n. 244, and R. Dixon, 'Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited', 5 *International Journal of Constitutional Law* (2007) pp. 391-418. For a more critical view, see Tremblay, *supra* n. 248, pp. 617-648.
[256] See generally Slaughter 1994, *supra* n. 81, at pp. 99-137; A.M. Slaughter, 'A Global Community of Courts', 44 *Harvard International Law Journal* (2003) 191; R.B. Ahdieh, 'Between Dialogue and Decree: International Review of National Courts', 79 *New York University Law Review* (2004) pp. 2029-2163. On dialogue between the national courts and the Court of Justice of the European Union, see in particular Claes et al., *supra* n. 246, and V. Skouris, 'The Position of the European Court of Justice in the EU Legal Order and its Relationship with National Constitutional Courts', *Zeitschrift für öffentliches Recht* (2005) p. 323 at p. 328.
[257] In more detail, see the sources mentioned in the previous footnote and Gerards 2011, *supra* n. 26, at p. 83. It is argued there that this interrelationship could better be described in terms of 'dialectics' than 'dialogue'(see also Ahdieh 2004, *supra* n. 256, at pp. 2033 and 2088), but since the term 'dialogue' is more commonly known, it has been used throughout this report.
[258] See also Gerards 2011, *supra* n. 26, at pp. 84-85.
[259] Cf. Bratza 2012, *supra* n. 82, at p. 27.

a sequence of cases, in particular in the case of *Al-Khawaja and Tahery*,[260] the Court had ruled that the use of statements of such absent witnesses would violate the right to a fair trial (Article 6 ECHR) if it were the 'sole or decisive evidence' against the suspect in the criminal case. In the United Kingdom, however, there is a longstanding tradition of using of hearsay evidence, even if it is the only evidence against the suspect. Instead of completely rejecting the evidence, as was advocated by the Court, an intricate set of requirements have to be met to guarantee a fair trial; if these requirements are met, the evidence may still be used. Given this domestic legal system, the UK courts found that the Court's interpretation of Article 6 was too strict and it did not do justice to the safeguards inherent in the British system. For this reason, Lord Phillips of the (then) House of Lords (now the Supreme Court) expressly stated in the case of *Horncastle* that it would not accept the Court's reading of the Convention:

> '… The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.'[261]

Lord Phillips went on to argue that the 'sole or decisive rule' had been introduced into the Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle, applicable equally to the continental and common law jurisdictions; that English law would, in almost all cases, have reached the same result in those cases where the Strasbourg Court has invoked the 'sole or decisive rule'; that the 'sole or decisive rule' would create severe practical difficulties if applied to English criminal procedure and that, therefore, the sole or decisive rule should not be applied in English law.

The Court thus faced a clear rejection of its 'sole or decisive' rule by the UK Supreme Court. Of course, the Court could ignore such a rejection and maintain its own interpretation and rule, but that approach would not be likely to be very successful – if the UK courts were stubbornly to refuse to adopt the Court's case law, the result would be a stalemate.[262] Instead, however, the Court appeared to regard the judgment in *Horncastle* as an invitation to a dialogue between highest courts. In its Grand Chamber judgment on the matter, the Court expressly responded to the House of Lords' concerns and criticism.[263] It acknowledged that '[d]rawing on the judgment of the Supreme Court in *Horncastle and others*, the Government challenge the sole or decisive rule, or its application by the Chamber in the present cases, on four principal grounds'.[264] The Court then extensively discussed all four grounds , thereby reaffirming the principles the Chamber had previously defined and defending the 'sole or decisive' rule.[265] Importantly, however, the Court concluded by adding a significant nuance: it accepted that inflexible application might have unwarranted outcomes.[266] It accepted that the use of hearsay evidence as sole or decisive evidence would not immediately violate the right to a fair trial if there are sufficient counterbalancing factors and strong procedural guarantees that permit a fair and proper assessment of the reliability of such evidence. It concluded that the safeguards

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[260] ECtHR 20 January 2009, appl. nos. 26766/05 and 22228/06.
[261] *R (Horncastle and others)* [2009] UKSC 14 (*per* Lord Phillips), para. 11.
[262] Perhaps except for the rather unlikely situation in which the Committee of Ministers would take political action towards the United Kingdom to force it to adopt the Court's interpretation.
[263] *Al-Khawaja and Tahery* v. *the United Kingdom*, ECtHR (GC) 15 December 2011, appl. nos. 26766/05 and 22228/06.
[264] Al-Khawaja and Tahery v. the United Kingdom, para. 129.
[265] Al-Khawaja and Tahery v. the United Kingdom, paras. 130-146.
[266] Al-Khawaja and Tahery v. the United Kingdom, para. 147.

developed in the UK were, in principle, sufficiently strong, even if it might hold differently in concrete cases.[267]

Treading very carefully, the Court thus entered into a well-articulated, elaborately reasoned dialogue with the highest court in the UK. It directly responded to the Supreme Court's criticism, it provided a clarification and a better foundation for its own case law, and it even conceded (to some extent) the Supreme Court's approach by admitting that, in some situations, exceptions should be allowed to the 'sole or decisive rule'. Indeed, the former President of the Court, Sir Nicolas Bratza, expressly confirmed in his concurring opinion in the case that the judgment should be read as a response to the *Horncastle* judgment:

> 'The present case affords, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention to which Lord Phillips was referring. The *Horncastle* case was decided by the Supreme Court after delivery of the judgment of the Chamber in the present case, to which I was a party, and it was, in part, in order to enable the criticisms of that judgment to be examined that the Panel of the Grand Chamber accepted the request of the respondent Government to refer the case to the Grand Chamber.'[268]

Of course, it remains to be seen how the British courts will respond to the Grand Chamber's judgment and whether they will accept the Court's slightly modified reading of the 'sole or decisive rule'. If they do, the dialogue will be closed; but if they do not, it is highly possible that a new case will reach the Court and it will have to find a new response to the UK courts' arguments. The interplay or dialogue by means of judgments can then easily continue until such time as one court accepts the other's position.

6.2.3 Approval of national responses to the Court's judgments

In the case of hearsay evidence, the dialogue by means of judgments is one in which the Court responded directly to criticism rendered by a national court. In other cases, the dialogue is of a different nature. Here, the Court uses its judgments to express its approval of the response a national highest court has given to an earlier judgment of the Court.[269] In this situation, the national court seeks to comply with the Convention rather than stressing its disagreement with the Court's approach. Perhaps this may seem surprising, but it appears that engaging in a 'constructive dialogue' with the Court on the standards to be applied by national courts may be a good way to influence the Court's case law as well as protect their own position.[270] This can be illustrated by a series of judgments against Germany on the publication of photographs of celebrities in the tabloid press. The German courts had long held that publication of such photos could be published, even if they disclosed the private life of public figures, as long as the celebrities were regarded as 'absolute Personen der Zeitgeschichte'. The Court found very differently in its first judgment in the case, *Von Hannover*.[271] It held that the standards applied by the German courts offered too much protection to the freedom of expression of the tabloid press, and too little to the privacy interests of public persons. In the Court's view, a different standard should be applied, based on the nature and general importance of the in-

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[267] The Court also applied the new standards to the facts of the cases of Al-Khawaja and Tahery; thereby it found no violation of Article 6 in the case of Al-Khawaja, but it did find a violation in the case of Tahery – the requirement of sufficient counterbalancing factors and strong procedural safeguards was not met in his case.

[268] *Al-Khawaja and Tahery* v. *the United Kingdom*, concurring opinion of Judge Bratza, para. 2.

[269] This situation is similar to the 'second look' cases in constitutional dialogue: there, it may happen that a court has found a violation of a fundamental right by legislation and has ordered the legislature to amend the relevant law, but after amendment a new case may be brought in which the legality of the amended legislation is again contested. The court then has to decide if the amended legislation is compatible with the Convention. Arguably, the review must then be more deferential than in 'first look' cases – see Dixon 2007, *supra* n. 255, at p. 393.

[270] See further on this Stone Sweet 2012, *supra* n. 10, at p. 1867.

[271] ECtHR 24 June 2004, appl. no. 59320/00.

formation disclosed by the photos: if the aim of publishing pictures was only to satisfy the readers' curiosity, the interest of freedom of expression could not easily outweigh the privacy interests of the persons depicted, but it could be different if the photos were part of a debate on a topic of general interest.

This judgment of the Court, which held an express rejection of a longstanding interpretation by the German constitutional court, encountered fierce criticism in Germany.[272] Nevertheless, the highest German courts conceded to the Court's judgment, accepting that their own standards should be replaced by the Court's.[273] One main question remained, however, which was if the new interpretation given by the national courts were really in line with the Court's case law. An opportunity for the Court to respond to the national response to its judgment arose when a new case on the publication of photos of celebrities in their private capacity reached the Court: *Von Hannover (No. 2)*.[274] In its judgment on the case, the Grand Chamber of the Court made good use of the occasion to explicitly analyse and accept the new German standards:

> '125. The Court … observes that the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the *Von Hannover* judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law.
> 126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.'

In this case, thus, the national highest courts responded to the Court's criticism of their earlier case law by modifying their standards to meet the Strasbourg requirements. In turn, the Court explicitly responded to this by evaluating and finally accepting the new case law. A similar approach is visible in a series of other cases against Germany, related to preventive detention of dangerous criminals.[275] Again, this could be seen as a form of dialogue by means of judgments.

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[272] Indeed, it has been said that the judgment is the main cause for the principled stance the German Federal Constitutional Court took in the case of *Görgülü*, in which it stressed that it would normally readily comply with the Court's judgments, but in cases of clear conflict between the ECtHR's standards and the standards reflected in the German Constitution, the latter would prevail (Order of the German Constitutional Court, BVerfG, 2 BvR 1481/04 of 14 October 2004, especially paras. 49-50); on this judgment, see also H.-J. Papier, 'Execution and effects of the judgments of the European Court of Human Rights from the perspective of German national courts', 27 *Human Rights Law Journal* (2006) p.1. See further e.g. G. Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts', 23 *European Journal of International Law* 2012 (2), pp. 401-424, at p. 410 and B. Rudolf, 'Council of Europe: *Von Hannover v. Germany*', 4 *International Journal of Constitutional Law* (2006) pp. 533-539 at p. 533.

[273] See the judgments of the German high court (BGH 6 March 2007, no. VI ZR 51/06.ß) and the federal constitutional court (BVerfG 26 February 2008, nos. 1 BvR 1626/07 and 1 BvR 1602/07).

[274] ECtHR (GC) 7 February 2012, appl. nos. 40660/08 and 60641/08.

[275] For this dialogue, see in particular *M.* v. *Germany*, ECtHR 17 December 2009, appl. no. 19359/04; *Haidn* v. *Germany*, ECtHR 13 January 2011, appl. no. 6587/04; *Kallweit* v. *Germany*, ECtHR 13 January 2011, appl. no. 17792/07; in the latter two cases, the Court expressly welcomed the response by the German courts to its judgment in *M.* v. *Germany*: 'It notes that several Courts of Appeal, as well as a senate of the Federal Court of Justice, on the contrary, have considered it possible to interpret German law in accordance with the Convention ... and that the Government in the present proceedings agreed with that view. In the light of the foregoing, the Court does not consider it necessary, at present, to indicate any specific or general measures to the respondent State which are called for in the execution of this judgment. It would, however, urge the national authorities, and in particular the courts, to assume their responsibility for implementing and enforcing speedily the applicant's right to liberty, a core right guaranteed by the Convention' (*Kallweit*, para. 83). See in more detail Ch. Michaelsen, '"From Strasbourg, with Love" – Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights', 12 *Human Rights Law Review* (2012) pp. 148-167 and Andenas and Bjorge 2011, *supra* n. 28, pp. 30-36.

6.2.4 Requirements for a successful dialogue by means of judgments

In the examples of dialogue by means of judgment discussed in sections 6.2.2 and 6.2.3, there is a relatively direct interaction between national (highest) courts and the ECtHR on the interpretation and application of the Convention. This kind of dialogue is very favourably received by the Court, as the interviews conducted with a number of judges and registrars made clear. Dialogue by means of judgments is particularly regarded as a very good way to give shape to the notion of 'shared responsibility' for guaranteeing the Convention rights. Indeed, one can easily understand why this form of dialogue is attractive. The criticism and responses voiced in the national case law are framed in legal terms that are easy for the Court to understand, and they are directed to concrete issues of Convention interpretation and application. Speaking the same kind of language certainly facilitates an effective dialogue.[276] Moreover, political scientists have stressed that domestic judiciaries are the most important domestic allies for the implementation of the Court's rulings, since they apply European human rights law to the domestic legal context and thereby provide a local resource for individuals.[277] For that reason, too, there is good cause for the Court to collaborate with the national courts, and to regard them as co-equal partners, rather than supervising and correcting them from a hierarchical position.[278] Perhaps one would therefore expect such 'dialogues' to be frequent and visible. Nevertheless, such explicit examples as were given in sections 6.2.2 and 6.2.3 are relatively rare, and they seem to be limited to cases from Germany and the United Kingdom. There may be other cases where the Court responds to national concerns expressed in judgments, but such responses are far more implicit, and it would require a sharp eye from the reader of the judgment to discern that the Court is actually responding to a national judgment.[279] Nevertheless, even such 'hidden', implicit dialogues can be very effective, as long as the result is to enhance the shared responsibility of the Court and the national courts.

For a dialogue by means of judgments to be effective, it is therefore not necessary that the Court explicitly mentions the element of dialogue, or even expressly refers to a national judgment. What is essential is that the national courts express any concerns, criticism and questions in such a way that the Court is effectively enabled to respond.[280] If national courts have great difficulty in fitting a typical Convention interpretation into their own national law, yet do not say so and just try, it may simply not be clear to the Court that there is an invitation to dialogue. Similarly, if national courts do not speak with one voice, and one high court tends to accept the Court's interpretation while another rejects it, it may be difficult for the Court to know where it should respond. What the examples given in sections 6.2.2 and 6.2.3 have in common is that they concern clearly expressed judgments by national highest courts, which either made it very clear that there are difficulties related to a line of Strasbourg case law, or that the courts have adapted their case law and are now asking for approval by the Court.

Thus, as the interviewees also stressed, if national courts want to contribute to the process of giving shape to the Convention and want to engage in a process of dialogue and shared responsibility

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[276] Cf. Slaughter 1994, *supra* n. 81, at p. 125.

[277] See e.g. C. Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights', *Human Rights Review* 2012, DOI 10.1007/s12142.012.0227.1.

[278] This element of relative co-equality is of great importance for a successful dialogue – see further on this Slaughter 1994, *supra* n. 81, at p. 122; L.R. Helfer, 'Forum Shopping for Human Rights', 148 *University of Pennsylvania Law Review* (1999) pp. 285-400 at p. 349; Ahdieh 2004, *supra* n. 256, at p. 2088; Torres Pérez, *supra* n. 86, at p. 123.

[279] Nevertheless, many of the Court's judgments, in particular those in which it consciously applies procedural review or a consensus-based interpretation, can be regarded as examples of implicit dialogue, as these judgments can be seen as clear responses to judgments by the national courts, or as invitations to national courts to respond to the Court's judgment.

[280] As has been mentioned by Ahdieh, this requirement presupposes the strong embedding of the Convention in national law; in states where the Convention is not (yet) regarded as a logical, self-evident legal source that has to be taken into account, there is less chance of an effective dialogue; cf. Ahdieh 2004, *supra* n. 256, at p. 2155. Furthermore, it must of course be stressed that there are more prerequisites for effective dialogue than are mentioned here; for these, see in particular the sources mentioned in footnote 256 above.

for Convention application and interpretation, they would need to express themselves clearly and unequivocally, and they would need offer elaborate, well-considered arguments for disagreement or doubt. Having a constitutional court with strong competences for reviewing national legislation and interpretation of international treaties may be helpful in this respect, but it is possible to start a dialogue even in states without constitutional review, or without a single highest court. The provision of clearly expressed, well-reasoned questions and arguments is sufficient.

The respondents to the interviews confirmed that it would be desirable if courts in other states than the UK and Germany were to make better use of the possibilities offered by that dialogue by means of judgment. More equal participation in the dialogue might help to prevent a bias in the Court's case law towards the national law and traditions of the states where the judges express their criticism and complaints most eloquently.[281] Especially given the *res interpretata* effect of the Court's judgments, an interpretation given in a case such as *Al-Khawaja and Tahery*, which is now well aligned to the British common law approach to hearsay evidence, is also relevant to all other European states. Thus, the response given by the Court to criticism in one state may have effects in all 46 others. If the Court is asked to respond to national criticism in this manner by only one or two states, the effect might be that typical elements of their legal systems are addressed more frequently and more explicitly than those of others, and thereby have more effect on the Court's overall interpretation of the Convention. Of course the Court can use strategies of procedural review and judicial minimalism to avoid such effects, yet it is clear that its case law might be more balanced if it had to engage in dialogue with other states with different constitutional and legal traditions.

6.2.5 Conclusion

Dialogue by means of judgments is an important mechanism for safeguarding the Convention, expressing as it does the national courts' and the Court's shared responsibility in this respect. If national courts criticise the Court's approach, the Court can respond by modifying or re-establishing its case law, and if national courts are in doubt about the conformity with the Convention of a certain line of case law, they can ask the Court to deny or confirm their reading of the Convention. By inviting such national criticism and by responding to it openly and extensively, the Court may also find a way out of the conundrum of having to respond to national criticism while needing to protect the Convention. Simultaneously, by empowering the national courts to make use of this avenue of judicial dialogue, states may create a counterbalance against the power of the Court to interpret the Convention in a very autonomous and evolutive fashion. For these reasons, judicial dialogue by means of judgments is certainly a very valuable instrument.

6.3 Formal and informal dialogue between judges; advisory opinions

6.3.1 Exchange of information between courts

Many forms of dialogue are conceivable between the Court and national judges. Interaction can, for example, be facilitated by comparative interpretation or procedural review. Interestingly, moreover, there are several direct forms of dialogue which can be helpful in relation to the shared responsibility for the effective application of the Convention. In particular, the importance of meetings and exchange of knowledge and experience between judges has been emphasised in legal scholarship, as well as in the interviews conducted at the Court.[282] It appears to be very useful for the Court to ex-

[281] It has been shown, after all, that national legal rules and principles may spread through the medium of ECtHR judgments in which a response is given to these rules, particularly as a result of *res interpretata*; see also Slaughter 1994, *supra* n. 81, at pp. 111-112. On the importance of equal participation, see also Torres Pérez, *supra* n. 86, at p. 126.
[282] Slaughter 1994, *supra* n. 81, at p. 103. See also e.g. Bratza 2012, *supra* n. 82, at p. 27.

change views with judges of national courts, since it thereby gains direct access to information on the national legal situation, particular lines of case law that are difficult to apply in national law, and concerns about certain interpretations. It may not always be able to respond directly to such concerns or such information in its judgments, but the exchanges can help the Court know which case law needs further clarification or which cases should go to the Grand Chamber. The national judges may also benefit from such exchanges of information. Of course, the benefit is greatest if their concerns are translated into new interpretative approaches by the Court. Equally valuable, however, is that direct information can give them clarity about the underlying reasons for certain decisions, or the way they could implement the Court's case law in their own judgments. Such informal contacts benefit an effective cross-fertilisation, as well as increasing the embedding of the Court's case law in national law.[283] Nevertheless, such exchanges of information can sometimes be counterproductive. If national judges leave with the impression that their concerns have not really been heard, or if the exchange remained superficial, such visits can be considered fruitless and time consuming.[284]

Exchange visits between (highest) courts and the Court are not at present organised systematically. Some national courts engage in regular exchange visits, others (also) participate in associations or networks of highest courts that do as such have contact with the Court, while still other courts only rarely have contact with the Court. Several interviewees at the Court stressed that the value of these informal visits is such that it would be valuable to organise them on a more regular basis. Indeed, it may also be beneficial because (just as with the dialogue by means of judgments) there is a risk of bias in the Court's interpretations towards those states whose judges frequently discuss Convention interpretation with the Court, as compared to states whose judges hardly ever visit the Court. For the Court itself, however, this is difficult to organise – the possibility of regular scheduled meetings has to be accommodated by, for example, the Council of Europe.[285]

Some respondents in the interviews at the Court also stressed that it would be advantageous to the 'shared responsibility' of protecting the Convention if there were not only interaction between the national courts and the Court, but also between the various national courts *inter se*. If Dutch judges could discuss Convention interpretation and implementation with Polish judges, for example, or Russian judges with Austrian ones, it could result in an exchange between equals of good practices and practical solutions. This could contribute to the proper application of the Convention at the national level, or, eventually, in a clear judicial invitation to the Court to dialogue by means of judgments. Indeed, networks between judges already exist, but they do not specifically relate to fundamental rights and they are usually limited in their geographical scope.[286] The establishment of networks for judges with a special focus on Convention law could be very valuable, but again, the Court itself is unable to provide this itself.

6.3.2 Advisory opinions

In the future it may be that the dialogue between the national courts and the Court could be further facilitated by the introduction of a procedure for advisory opinions. Based on the political agreement

[283] See Slaughter 1994, *supra* n. 81, at pp. 103 and 117; on the value of networks between national judges and international courts, see also E. Mak, *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford, Hart, forthcoming), ch. 4 section 2.

[284] Cf. the experiences of national judges chronicled by Mak, *supra* n. 283, ch. 4 section 2.

[285] Of course, there is the annual seminar 'Dialogue between judges', where presidents of national highest courts and senior judicial officials visit the Court (on this, see http://www.echr.coe.int/echr/en/header/reports+and+statistics/seminar+documents/dialogue+between+judges). This meeting is very valuable as an opportunity for contacts, but the exchange of information there is obviously not as deep and detailed as when a judicial delegation from one particular state visits the Court.

[286] Mak, *supra* n. 283, ch. 4 section 2.

expressed in the Brighton Declaration of 2012,[287] there will be an optional protocol that makes it possible for national highest courts to refer a question of interpretation or application of the Convention to the Court.[288] Somewhat similar to the Court of Justice of the EU in preliminary reference cases, the Court may then provide a direct answer to such a question, which could then be used by the national court in its own judgments. Thus, in a situation such as that of the publication of photos of celebrities in the tabloid press, it would not be necessary to wait for an individual case to be brought before the Court to ask the Court expressly or implicitly for approval of a new standard or a new line of case law.

This procedural mechanism would open a new avenue for judicial dialogue, which could be very effective.[289] In a reflective paper on the topic the Court welcomed the introduction of the procedure for this reason.[290] Nevertheless, it is acknowledged that there may be disadvantages to such a formal and institutionalised dialogue.[291] Doubts have been expressed as to the efficiency of the procedure (especially as compared to the current dialogue by means of judgments)[292], the legal and practical effects of advisory opinions, as well as the impact of the new procedure on the Court's working methods.[293] Moreover, the same kind of issues arise as are presently visible in relation to dialogue by means of judgments: it may be that some courts ask questions much more frequently than others (particularly if the protocol is optional), which may result in a bias towards the legal systems of such states: their particular legal characteristics may be taken into account much more explicitly and more frequently than those of non-referring states. Thus, even if the advisory opinions may be promising in terms of channelling and accommodating judicial dialogue, much is still needed to shape the process into a smoothly running mechanism.

6.4 Conclusion

Using all the mechanisms and instruments analysed in sections 4 and 5, the Court often engages in judicial dialogue with national courts. It sometimes does do so expressly by means of its judgments. It may respond to national criticism by adapting, explaining or reconfirming its own interpretations of the Convention, or by evaluating whether a national judicial standard (adopted in response to the Court's case law) is in line with the Convention. Other forms of dialogue are more informal, such as exchange visits between national courts and the Court or networks of national judges for the exchange of good practices. In the future there will be a more formal mechanism for dialogue in the shape of the advisory opinions procedure.

These forms of dialogue may be favourably considered as ways to effectively protect the Convention rights, in line with national legal traditions and national legal systems. Thus, judicial dialogue is conducive to reducing the tension between the pull and push factors inherent in the ECHR system

[287] High Level Conference on the Future of the European Court of Human Rights – Brighton Declaration, 19-20 April 2012, para. 12d.
[288] For a draft of this protocol (Protocol No. 16), see Draft Protocol No. 16 to the Convention, Steering Committee for Human Rights (CDDH) 30 November 2012, CDDH(2012)R76 Addendum V. The idea of a preliminary reference or advisory opinions procedure was already advanced by the Group of Wise Persons who advised on the future of the Court in 2006; see Report of the Group of Wise Persons to the Committee of Ministers, 979bis Meeting, 15 November 2006, para. 78f. For the further history of the proposal, see the Draft CDDH Report on the proposal to extend the Court's jurisdiction to give advisory opinions, DH-GDR(2011) R8 Appendix VII, 9 November 2011.
[289] Cf. Tulkens 2012, *supra* n. 14, at p. 10; J.-P. Jacqué, 'Preliminary references to the European Court of Human Rights', in *How can we ensure greater involvement of national courts in the Convention system?*, Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 17-23 at p. 20.
[290] ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction (2012) #3853038, para. 4.
[291] See e.g. Lübbe-Wolf, *supra* n. 81, at p. 13.
[292] Lübbe-Wolf, *supra* n. 81, at p. 13.
[293] For a review of the pros and cons of the procedure, see generally Draft CDDH Report on the proposal to extend the Court's jurisdiction to give advisory opinions, DH-GDR(2011) R8 Appendix VII, 9 November 2011 and ECtHR, *Reflection paper on the proposal to extend the Court's advisory jurisdiction* (2012) #3853038.

and to fostering shared responsibility between the Court and the states. Nevertheless, it also has been submitted in this section that judicial dialogue will only be successful if the national courts express their views and concerns in an explicit manner, underpinning them with sound arguments, and if the Court takes good care to avoid bias in its own interpretations towards the states where the most eloquent and understandable criticism is voiced.

7. Dialogue and national political and media criticism

The previous section dealt with the interaction between the Court and national courts, and the way the Court can respond to criticism of its judgments voiced by national judges. In recent years, however, the Court also has been confronted with criticism by national politicians (members of parliament, government members) and criticism in the national media. In itself, this is nothing very new – the Court has always been criticised. Perhaps it is even self-evident that there will always be criticism of an 'outsider' such as the Court. It is, after all, an international, remote judicial institution, lacking democratic legitimacy, which has to decide on sensitive issues, and which aims to protect the rights of those whom many members of society would prefer to be outcast (such as suspects of crimes, members of discriminated minority groups, persons expressing shocking and distressing opinions). To some extent, therefore, criticism is unavoidable. It is also important to note, moreover, that such criticism has not thus far affected the overall acceptance of the Court and its competence – the legitimacy of the Court and the authority of its judgments have long remained unquestioned.

It therefore came as a surprise that by the end of the 00s, in the Netherlands and the United Kingdom some politicians, academics and media began to question the very foundations of the system.[294] Possibly triggered by discontent with judgments such as those on prisoners voting (in the UK) and on the rights of asylum seekers and immigrants (in the Netherlands), politicians, newspaper journalists and some academics asked explicitly if the Court did not interfere too strongly with national law and policy. Questions were raised regarding the undemocratic nature of the Court, its interference with national sovereignty caused by its competence to render binding judgments, and its extension of the scope of fundamental rights. In both countries, proposals were made to curb the Court's competences, e.g., by codifying the principle of subsidiarity and by obliging the Court to respect the states' margin of appreciation. Some of the UK media even invited the UK to pull out of the system, or at least ignore certain judgments against the UK. The British government's position during its chairmanship of the Council of Europe was rather negative towards the Court, resulting in a number of very critical proposals for the intergovernmental conference at which the future of the ECtHR would be discussed.[295] In the Netherlands, the political criticism equally resulted in a number of proposals to create countervailing powers for the Court (e.g., by giving the Committee of Ministers a stronger position), as well as in a legislative proposal (initiated by a member of parliament) to curb the possibilities for judicial review of legislation for compatibility with provisions of international law.[296]

Thus, the criticism of the late 00s seems to be of a more fundamental, deeper nature than criticism expressed in earlier times. Of course, this raises the question of how the Court should respond to such criticism, which, after all, is directed at its own work and position.

As can be seen from the previous sections, and as was confirmed in the interviews, the recent criticism of legitimacy has had no direct impact on the Court's case law. The Court has always been aware

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[294] For a recent discussion of the criticism in the UK and the Netherlands, see e.g. Gerards 2012, *supra* n. 81, pp. 173-202.
[295] On this see also L. Helfer, 'The Burdens and Benefits of Brighton', 1 *ESIL Reflections* (2012).
[296] For a discussion of these issues, see J.H. Gerards and A.B. Terlouw, 'Solutions for the European Court of Human Rights: The *Amicus Curiae* Project' in T. Zwart, S. Flogaitis, J. Fraser, eds., *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (London: Edward Elgar UK 2013) (forthcoming).

of its delicate relationship with the states, as witnessed by its use of consensus and meta-teleological interpretation, its reliance on 'judicial minimalism' and its frequent references to the primary responsibility of the states to protect the Convention. Over the past few decades, relatively new approaches such as procedural review and the 'in for a penny, in for a pound' approach have been added. These adjudicative approaches bear witness to the Court's desire to encourage a 'shared responsibility' approach to the protection of fundamental rights – it needs to collaborate with national courts if it is to succeed in achieving its purpose of safeguarding the Convention rights. These approaches have not really changed since the criticism in the UK and the Netherlands came up. The only tell-tale sign of the Court's sensitivity to the criticism is that it seems to stress even more explicitly than before that a certain change of approach is a response to national case law, that a lack of European consensus demands a wide margin of appreciation, or that the Court 'would need strong reasons' to strike a different balance between conflicting interests than the national courts have done. But even if these signs seem obvious, there may many different explanations for them, and they may even not reflect real changes at all. It may well be that it is mainly perception and expectation that make such changes visible: if the court watcher expects a change as a result of criticism, he can easily read all in judgments a confirmation of this expectation, and vice versa. Indeed, the interviewees at the Court all confirmed that there is no conscious, intent effort by the Court to change its approaches and methods in response to the recent criticism. The respondents agree that it is hard to ignore the criticism, as it forms part of the general context in which the Court has to decide its cases. Yet the Court always aims to decide on the basis of the facts of the case and the reasonableness of an interference, rather than on the basis of strategic and political arguments related to its position vis-à-vis the states.

The response by the Court to the criticism is really of a different nature. The two former Court presidents have written papers for academic law journals to explain the Court's work, to clarify the reasons behind its case law and to rebut some of the criticism rendered by politicians, academics and journalists. Various judges and registrars have acted as ambassadors of the court in speeches and public lectures, in newspapers and in television interviews. On an official and formal level, the plenary court has been involved in preparing the intergovernmental conference on the Court's future, reflecting the various proposals made, inter alia, by the British government. Indeed, the interviewees indicate that such relatively informal responses are the only ones that are fitting for the Court. Moreover, various respondents stress that it is hardly possible to respond differently. A court such as the ECtHR can respond well to national judicial criticism, which is given in legal terms and relates directly to specific interpretations and lines of case law. The criticism offered by politicians and the media in the debate referred to above is much more diffuse and lacks a clear sense of direction. Moreover, it is difficult to respond to the criticism as it is unbalanced: it comes from a limited number of states, while other states embrace the Court and even use the Court's judgments as leverage to effect legal and constitutional change in their own legal systems.[297] It would be rather awkward, then, if the Court were to respond in any way other than by carrying on doing its work and explaining the importance of the Convention system in extra-judicial speeches and media efforts. It is simply hoped that the storm will blow over and it is sufficiently clear to the people living in the 47 states of the Council of Europe that there is great value in an effective European court that can correct national governments if they do not sufficiently protect fundamental rights.

[297] See, for example, A. Garapon, 'The limits to the evolutive interpretation of the Convention', in: *What are the limits to the evolutive interpretation of the Convention?*, Dialogue between judges (European Court of Human Rights, Council of Europe, 2011) pp. 29-38, on the changes that were brought about in French criminal procedure as a consequence of a number of recent ECtHR judgments.

8. Summary and conclusions

The aim of this report was to analyse the Court's case law to see examine the extent to which the Court endeavours to influence national judicial decision making, the degree to which it respects national sensitivities and traditions, and how it responds to national criticism (either political or judicial). In section 2 it was explained that the Court's function is threefold: it is there to protect Convention rights in individual cases; to provide a minimum level of protection; and to do so in a way that is complementary and subsidiary to the protection offered by the national authorities. Taken together, these three functions should help to guarantee fundamental rights to all individuals living in Europe. In practice, however, it appears that there is a clear tension between the desire to protect fundamental rights (the 'push factor') and the desire of the states to do so as they think fit (the 'pull factor'). In giving shape to the Convention, the Court has to find a balance between respecting national sovereignty and national diversity on the one hand, and protecting Convention rights on the other.

Section 3 clarified that the Court increasingly undertakes its task of guaranteeing Convention rights in close collaboration with the national courts. The Court requires national courts to adopt and apply its interpretations and adjudicative methods, even if they have been given in cases against other states. Thus a situation of 'shared responsibility' is created, whereby the national courts are just as responsible for safeguarding the Convention as the Court is. This results in a number of obligations on the national courts, such as the obligation to adopt the Court's evolutive and autonomous interpretations, but it also leads to increased deference by the Court in evaluating national case law.

Sections 4 and 5 provided a further analysis of the different judicial techniques the Court has developed, which shape the current situation of 'shared responsibility'. It has been shown how the Court can employ the various techniques to negotiate between the need to provide a sufficiently high minimum level of human rights protection and the need to respect national diversity and national sovereignty. It has been shown that the Court is usually able to employ these methods to its own benefit and it can use them to encourage the national courts to accept their share of the responsibility under the Convention. This is true in particular of procedural review, judicial minimalism and the 'in for a penny, in for a pound' approach – all of which help to make the national authorities, and national courts in particular, responsible for the implementation of the Convention. Moreover, by providing evolutive and autonomous interpretation, and lists of general criteria to be applied by national courts, to be respected by national decision-makers, the Court is able to guarantee a minimum level of protection.

Section 6 dealt with the notion of judicial dialogue and its application in the Convention context. It was explained that, especially in more recent years, the Court has given elaborate and explicit responses in its own judgments to criticism and concerns raised by national (highest) courts. Moreover, the Court sometimes evaluates and approves the changes made by national courts in response to the Court's own case law. This 'dialogue by means of judgments' is supplemented by various forms of informal dialogue and, in the future, it will be further added to by the introduction of a system of advisory opinions. The various forms of dialogue enhance collaboration between the national courts and the Court and they contribute to the 'shared responsibility' for compliance with the Convention. The use of instruments such as those described in sections 4 and 5 can thus be conducive to reducing the tension that seems to be inherent to the Convention system.

Finally, section 7 addressed the Court's concrete response to the political and media criticism of the past few years. It was explained that the criticism has had no visible or measurable impact on the Court's argumentative approach and its adjudicative methods. Responses are only visible in the extra-judicial sphere, viz., in articles written and speeches given by judges and registrars, or in the position papers written on proposals for change.

Based on all of this, it can be concluded that the Court places high demands on national judges. The Court asks national courts to apply its case law and even copy its argumentative approaches. This

may be problematic, especially where such interpretations are far-reaching, or where the Court's requirements conflict with national judicial competences. On the other hand, the Court often defers to national law and national judgments. It avoids giving deeply reasoned and excessively wide interpretations and argumentation, thereby allowing the states (and the national courts) some leeway to adhere to their own views and legal traditions. It applauds states for introducing procedural remedies that enable the courts to take the Court's general principles into account in deciding individual cases, and it actively responds to national judicial criticism and concerns.

In fact, thus, the Court seems to regard the national (highest) courts as national extensions, which can help it to implement the Convention and to protect the Convention at a grassroots level. Indeed, it is logical that it would take this view, as the national courts are, like itself, *courts*, which speak the same language and are characterised by the same kind of legal reasoning. It is therefore very interesting to see whether the national courts are able to meet the expectations that are implicit in the Court's idea of shared responsibility, i.e., if they are really able and willing to follow the Court's lead, or engage in dialogue where needed. This is one of the central questions in the various national reports that follow. In those reports, attention is both paid to the national courts' competences to comply with the states' obligations under the Convention and to implement the Court's case law in their own judgments, and to the national courts' willingness and preparedness to do so.

ANNEX

Questions for the interviews at the European Court of Human Rights

1. Evolutive and dynamic interpretation

It is well known that the Court is at present struggling with its enormous backlog and caseload. However, the difficulties that confronted it are also more fundamental in nature. It appears that there is increasing national criticism of its judgments, which are sometimes considered to conflict with national interests and sensitivities. It is often thought and said that the criticism of the ECtHR is connected to the Court's extensive interpretations of the Convention, which are the effect of the use of 'activist' interpretation methods such as evolutive interpretation, autonomous interpretation and consensus interpretation, and of the use of doctrines such as the positive obligations doctrine.

a. Do you agree that the scope of the Convention has greatly expanded over recent decades?

b. If so, to what extent do you think the expansion is the effect of the use of interpretative approaches and doctrines by the Court? Are other explanations possible?

c. Is the choice of evolutive interpretation a conscious one? I.e.: if a case requires a novel or more expansive interpretation of Convention rights, is this expressly taken into consideration in the deliberations?

d. Do you think that, over the past decade, there has been a change in the opinions and views within the Court on the use of evolutive and dynamic interpretation, and on the expansion of scope more generally (e.g.: is there more internal debate on the use of these methods, is there more criticism or disagreement in concrete cases)? If so, how can that be explained?

e. Do you think that the Court should decide primarily on the facts of the individual case, or rather that it should 'elucidate, safeguard and develop the rules instituted by the Convention'? What do you think is the general view in the Court? Do you think choosing one perspective or the other makes a difference in the way cases are decided and judgments are reasoned?

2. National criticism and the legitimacy crisis

In recent years the Court's work has been criticised by certain national politicians, national media and national scholars. The current and previous presidents of the ECtHR have defended the Court against such criticism,[298] but others have spoken of a 'backlash crisis' or a 'legitimacy crisis' that threatens the future effectiveness and authority of the Court.[299] The question that then arises is if the criticism affects the Court's work, and if so, how. The next few question relate to this issue.

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[298] J.P. Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments', 7 *European Constitutional Law Review* (2011), p. 173-182; Bratza 2011, *supra* n. 82.

[299] L. Helfer, 'The Burdens and Benefits of Brighton', 1 *ESIL Reflections* (2012) (1); see also the various contributions in 'T. Zwart, S. Flogaitis and J. Fraser, eds., *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (London, Edward Elgar UK 2013) (forthcoming).

a. Do you think there really is an increase in the national criticism of the Court? If so, do you think there is a difference in the tone or intensity of the criticism compared to earlier times? Is the criticism now voiced by different countries than before? When do you think the criticism started to intensify or change?

b. In your view, what are the main causes of criticism directed at the Court's legitimacy?

c. Do we have to take the criticism seriously, i.e., do you think it is necessary to take action in response to the criticism?

d. Do you think there is a response in the form of changes in the Court's argumentative approach? E.g.:
   - Increased use of non-substantive, rather procedural forms of review (checking the quality of national decision making instead of substantive justification review);
   - Paying more explicit attention to national arguments; showing greater understanding of national difficulties and national values;
   - Showing more deference, i.e. applying a wide margin of appreciation more frequently;
   - Making more use of lists of 'general principles derived from the Court's case law' to demonstrate that the judgments fit into a longer line of case law and is not really new;
   - Referring more often to other international instruments supporting the Court's judgments;
   - Making fewer explicit references to evolutive and dynamic interpretation;
   - Declaring more cases inadmissible *ratione materiae* because they do not really concern a Convention right;
   - ...

e. Do you think the Court should respond more explicitly to national criticism?
   i. If yes, should it do so mainly by means of its judgments? What should be changed in your opinion?
   ii. If yes, should it do so by other means, e.g. by such means as journal articles written by judges and registrars, by giving interviews and lectures, ...?

3. Dialogue between the Court and national courts

Much of the criticism of the Court currently appears to come from national politicians and national media, rather than national courts. There are some notorious examples, however, of national courts which have expressly held that they will not accept judgments of the Court that clearly conflict with national (constitutional) values. Examples are the UK Supreme Court in *Horncastle* and the German Federal Constitutional Court in *Görgülü*. An important question that is central to this research project is how and to what extent national courts apply the Convention notions and interpretative principles, as well as if and to what extent they sometimes refuse to do so. The reverse side of this issue is just as interesting: how does the Court respond to national judicial unwillingness to implement the Court's interpretations?

a. What is your opinion of such principled refusals by national courts to comply with the Court's interpretations?

b. Do you regard this type of principled resistance as a threat to the effective implementation of the Convention, or as problematic for other reasons?

c. Does the Court make a conscious effort in the argumentation of its judgments to facilitate national judicial application of its argumentative methods and interpretations? If so, what instruments does it mainly use to make it easier for national courts to adopt and use ECtHR interpretations in their own case law?

In the context sketched above, it is often said that there is a 'dialogue' between the national court and the ECtHR: the national court gives a certain interpretation to the Convention, the court is corrected by the ECtHR, the national court accepts (or refuses to accept) this correction and gives a new (or the same) interpretation, the ECtHR gives its views on the national interpretation, etc. (cf. *Von Hannover Nos. 1 and 2*; *M. v. Germany* and *Haidn/Kallweit*; *Al-Khawaja and Tahery*; *Hirst* and *Scoppola No. 2*).

d. What is your view of this type of dialogue? Is it valuable that it exists?

e. Are there any problems related to this 'dialogue'?

f. What kind of results do you think the Court's response to critical national judgments produces?

g. Do you think the dialogue between national courts and the ECtHR can be improved and, if so, how?

BELGIUM

Guan Schaiko, Paul Lemmens & Koen Lemmens

PART 1 – The status of international law in the national constitutional system

1. Can you briefly characterise your national constitutional system? Please pay attention to matters such as:

- **Character of the state (monarchy, republic, ...)**
- **System of government (parliamentary, presidential, ...)**
- **Character of the constitution (written, unwritten)**
- **System for and extent of separation of powers (both horizontal (trias politica), and vertical (federation vs. unitary state, decentralisation or devolution))**
- **Main sources of fundamental rights**

The Belgian Constitution defines the organization of the State, determines the attribution of competences between the various levels of authority and ensures the protection of several fundamental rights and freedoms.[1]

In 1831, Belgium was conceived as a parliamentary democracy under a constitutional monarchy in the form of a decentralised unitary state. As a result of several constitutional revisions, the most important being the revisions of 1970, 1980, 1988 and 1993, the unitary state has been transformed into a "federal State composed of Communities and Regions".[2] Apart from the federal authority, the State comprises three Communities (the Flemish Community, the French Community and the German-speaking Community)[3] and three Regions (the Flemish Region, the Walloon Region and the Brussels Region),[4] on the basis of four linguistic regions (the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital and the German-speaking region).[5] The competences of the Communities relate to personal matters, such as culture, education and youth policy. The Regions are competent in territorial matters, such as economic affairs, urban planning and tourism. Some important competences, such as foreign policy, justice and social security, remain within the power of the federal authority. In addition, all the residual powers of the State remain with the federal authority.[6]

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[1] The Constitution is written and consists of the following Titles: Title I: 'On federal Belgium, its components and its territory'; Title Ibis: 'On general political objectives of federal Belgium, the Communities and the Regions'; Title II: 'On Belgians and their rights'; Title III: 'On powers'; Title IV: 'On international relations'; Title V: 'On finances'; Title VI: 'On the armed forces and the police service'; Title VII: 'General provisions'; Title VIII: 'On the revision of the Constitution'; Title IX: 'The entry into force and transitional provisions'.

[2] Art. 1 of the Constitution of 7 February 1831 as coordinated on 18 February 1994. The Constitution was drafted on 25 November 1830, approved by a National Congress on 7 February 1831 and entered into force on 26 July 1831. An English version of the Constitution is available at www.dekamer.be/kvvcr/pdf_sections/publications/constitution/grondwetEN.pdf. See in general A. Alen and K. Muylle, *Handboek van het Belgisch Staatsrecht* (Mechelen, Kluwer 2011) pp. 289-293.

[3] Art. 2 of the Constitution. For a map, see D. Batselé, T. Mortier and M. Scarcez, *Initiation au droit constitutionnel* (Brussels, Bruylant 2009) p. 79.

[4] Art. 3 of the Constitution. For a map, see *ibid.*, p. 78.

[5] Art. 4 of the Constitution. For a map, see *ibid.*, p. 77.

[6] But see Article 35 of the Constitution according to which the federal authority only has competence in matters that are formally assigned to it by the Constitution. However, this constitutional provision, which completely reverses the current principle, has not yet entered into force.

Chapter IV of Title III of the Constitution defines the attribution of public powers between the various levels of authority. The federated entities, i.e. the respective Communities and Regions, exercise their constitutional powers on an equal footing with the federal authority. The legal norms issued by the federated entities have a force of law that equals that of the legal norms of the federal authority. Conflicts between the various norms are resolved, not on the basis of a hierarchy of norms, but on the basis of rules of competence.

These constitutional provisions have been elaborated in the Special Act on Institutional Reform (*Bijzondere Wet op de Hervorming der Instellingen*) of 8 August 1980.[7]

Institutionally, Belgium is a parliamentary democracy under a constitutional monarchy. The exercise of public authority at the federal level is distributed among three federal organs:

- federal legislative power is exercised jointly by the King, the 150-seat House of Representatives and the 71-seat Senate,[8] or exceptionally by the King and the House of Representatives only (in the matters referred to in Article 74 of the Constitution);
- federal executive power is entrusted to the King,[9] who, by reason of his inviolability and unaccountability, appoints ministers and federal secretaries of State.[10] Ministers are accountable to the House of Representatives.[11]
- judicial power is exercised by the courts of the judiciary, i.e. the ordinary courts established by virtue of the Constitution.[12]

The Communities and the Regions each have their own legislature and executive. They can create judicial bodies with specific, limited jurisdiction.

Articles 8 to 35 of Title II of the Belgian Constitution, on 'The Belgians and their rights', guarantee a number of rights and freedoms. The list includes civil and political as well as social, economic and cultural rights:

- the principle of equality before the law (Article 10) and non-discrimination (Article 11);
- the principle of equality between men and women (Article 11bis);
- the right to individual liberty (Article 12);
- the right of access to court (Article 13);
- the principle of legality in criminal matters (Article 14);
- the abolition of the death penalty (Article 14bis);
- the inviolability of the home (Article 15);
- the protection of property (Article 16);
- the right to freedom of belief, religion and expression (Articles 19 and 20);
- the protection of private life and family life (Article 22);
- the protection of the rights of the child (Article 22bis);
- the right to live in dignity, including the right to employment and to the free choice of an occupation, the right to social security, to health care and to social, medical and legal aid, the right to decent housing, the right to the protection of a healthy environment and the right to cultural and social fulfilment (Article 23);
- the right to education (Article 24);
- the freedom of the press (Article 25);

[7] Special Act on Institutional Reform [*Bijzondere Wet op de Hervorming der Instellingen*] of 8 August 1980, *Official Gazette* 15 August 1980, amended on several occasions.
[8] Art. 36 of the Constitution.
[9] Art. 37 of the Constitution.
[10] Art. 88 in combination with Arts. 96 and 104 of the Constitution.
[11] Art. 101 of the Constitution.
[12] Art. 40 of the Constitution.

- the right of assembly (Article 26);
- the right of association (Article 27);
- the right to address petitions to the public authorities (Article 28);
- the confidentiality of letters (Article 29);
- the right to free use of languages (Article 30);
- the right to consult administrative documents (Article 32).

Article 191 of the Constitution extends the protection of most of these rights and freedoms to foreigners on Belgian soil.[13]

These constitutional rights and freedoms have two main features.[14] First, the Constitution generally forbids preventive restrictions of rights. Thus, according to Article 25 of the Constitution, "the press is free; censorship can never be introduced; no security can be demanded from authors, publishes or printers".[15] In addition, the Constitution requires a formal basis in the legal order for any restriction. According to Article 15 of the Constitution, for instance, "no house search may take place except in the cases provided by law".[16]

According to Article 144 of the Constitution, disputes involving "civil rights" fall exclusively within the jurisdiction of the ordinary courts. The competence in criminal matters is not explicitly mentioned in the Constitution, but it is generally accepted that the ordinary courts also have the exclusive competence in respect of such matters. Sometimes the explanation for this is that a criminal judgment may affect a person's civil rights in the sense of Article 144 of the Constitution, such as the right to personal freedom, to property, etc.[17] Administrative disputes concerning the legality of administrative acts are considered to fall outside the framework of the "subjective rights" (Articles 144 and 145), and the legislature is therefore free to bring them under the jurisdiction of administrative courts. According to Article 145, administrative disputes concerning "subjective rights" of a "political" nature belong in principle to the competence of the ordinary courts, but the legislature is free to bring them under the jurisdiction of administrative courts.

The ordinary courts are organised in an hierarchical structure. At the top of the judiciary stands the Court of Cassation, whose jurisdiction covers the entire territory of Belgium. The Court of Cassation heads all the courts of the judiciary; it does not deal with the substance of the case but examines whether the decision referred to it contravenes the law or the rules of procedure.[18]

Court hearings are held in public, unless this is considered prejudicial to public order or morals.[19] Every judgment is reasoned. Formally, judgment is pronounced publicly[20]; in reality publication is ensured in other ways. Judges are independent in the exercise of their jurisdictional competences. The public prosecutor is independent in conducting individual investigations and prosecutions, without prejudice to the right of the competent minister to order prosecutions and the right of the Minister of Justice and the chief prosecutors to promulgate binding directives on criminal policy, including policy on investigations and prosecutions.[21] All judges are appointed by the King, upon

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[13] See in general Batselé, Mortier and Scarcez, *supra* n. 3, p. 68-69.
[14] See Alen and Muylle, *supra* n. 2, p. 795.
[15] See on the subject. J. Velaers, "'De censuur kan nooit worden ingevoerd'. Over de motieven van het censuurverbod', in X. (ed.), *Censuur* (Brussels, Larcier 2003) p. 13-50.
[16] See for another example, Const. Ct. 21 December 2004, no. 202/2004 on Art. 22 of the Constitution and Art. 8 § 2 of the ECHR.
[17] See in general J. Velaers, *De Grondwet en de Raad van State Afdeling wetgeving* (Antwerpen, Maklu 1999) p. 466.
[18] Art. 608 of the Judicial Code.
[19] Art. 148 § 1 of the Constitution.
[20] Art. 149 of the Constitution.
[21] Art. 151 § 1 of the Constitution.

presentation by the High Council of Justice.[22] The salary of members of the judiciary is fixed by statute.[23]

In addition to the ordinary courts, there is one Constitutional Court for the whole of Belgium.[24] Established in 1980, the Constitutional Court was conceived as a specialised judicial authority, independent of the legislature, the executive and the judiciary, to supervise the observance by the various legislatures of the constitutional division of powers between the federal authority and the federated entities. The initial name of the Constitutional Court was 'Court of Arbitration'.

By constitutional amendment of 15 July 1988, the competence of the Court of Arbitration was extended to review legislative acts for conformity with Articles 10 and 11 of the Constitution (principle of equality and non-discrimination) and Article 24 of the Constitution (right to education). As a result of the constitutional amendment of 23 March 2003, the supervisory competence of the Constitutional Court was further extended to the entire Title II of the Constitution (all fundamental rights), in addition to Articles 17 and 172 (tax principles) and 191 (rights of aliens) of the Constitution.[25] In 2007 the name of the Court of Arbitration was changed to 'Constitutional Court'.

Article 142 of the Constitution was implemented by the (repeatedly amended) Special Act on the Constitutional Court (*Bijzondere Wet op het Grondwettelijk Hof*) of 6 January 1989, which regulates the organization, jurisdiction, functioning and procedure of the Court and the effects of its judgments.[26]

The third important judicial body mentioned in the Constitution is the Council of State. There is a Council of State for all Belgium, the composition, competences and functioning of which are determined by law.[27] The Council of State was established by Act of 23 December 1946, *i.e.* before it was mentioned in the Constitution.[28]

The Council of State acts in two capacities:

- as an advisory body in legislative and regulatory matters;
- as the Supreme Administrative Court, which may itself suspend and annul administrative acts that violate higher norms, and which may review the internal and external legality of decisions of lower administrative jurisdictions.

2.a. To what extent are the national courts (and/or non-judicial bodies, such as Councils of State) empowered to review the compatibility of acts of parliament and other legislation with the constitution?

By national courts we understand the ordinary courts, the administrative courts and the Constitutional Court.

As to legislative acts, i.e. acts of the legislative bodies of the respective entities, the Belgian legal order has a central constitutional review mechanism, entrusted to the Constitutional Court.[29] The Court rules, by means of judgments, on conflicts of competence, on the conformity of legislative acts with

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[22] Art. 154 § 4 of the Constitution.
[23] Art. 154 of the Constitution.
[24] Art. 142 § 1 of the Constitution.
[25] Art. 142 § 2 of the Constitution.
[26] Special Act on the Constitutional Court (*Bijzondere Wet op het Grondwettelijk Hof*) of 6 January 1989 *Official Gazette*, January 7, 1989.
[27] Art. 160 of the Constitution, inserted (as Art. 107*quinquies*) in 1993.
[28] Act of 23 December 1946, *Official Gazette* 9 January 1947.
[29] See in general P. Popelier, *Procederen voor het Grondwettelijk Hof* (Antwerpen/Oxford, Intersentia 2008) p. 426.

the provisions of Title II[30] and Articles 170, 172[31] and 191[32] of the Constitution. Prior to the creation of the Constitutional Court, the courts had to interpret legislative acts in conformity with the Constitution; however, they had no competence whatsoever to annul or set aside legislative acts that violated the Constitution.[33]

A case can be brought before the Constitutional Court by certain authorities designated by statute, by any person who has a justifiable interest, or, in a preliminary issue, by any tribunal. A case may be brought before the Constitutional Court in two ways:

First, actions for annulment can be instituted before the Court by means of a petition which, as the case may be, is signed by the Prime Minister, by a member of a Community or Regional Government designated by that Government, by the president of a legislative assembly, or by a party with a justifiable interest.[34] The actions are, in general, only admissible insofar as they are lodged within six months after the publication of the act in the Official Gazette.[35] An action for annulment does not automatically suspend the effect of the challenged act. However, in case the act under challenge may cause an irrevocable prejudice, the Constitutional Court can, at the request of the applicant and in exceptional circumstances, order the entire or partial suspension of that act pending judgment on the merits.[36] If the action is well-founded, the challenged legislative act will be entirely or partially annulled.[37] Such annulment has a retroactive effect, which means that the annulled provisions must be deemed never to have existed. However, where the Court deems it necessary, it may, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or provisionally maintained for the period determined by the Court.[38] The judgments delivered by the Constitutional Court whereby actions for annulment are dismissed shall be binding on the courts with respect to the points of law settled by those judgments.[39]

Secondly, if a question comes up before an ordinary or administrative court on the conformity of a legislative act with the rules that have been established by or in pursuance of the Constitution to determine the respective powers of the State, the Communities and the Regions, or with a right or freedom guaranteed in Title II of the Constitution, or with Articles 170, 172 and 191 of the Constitution, the court is in principle under a duty to address a preliminary question to the Constitutional Court. A decision to refer a question to the Constitutional Court for a preliminary ruling has the effect of suspending the proceedings and the time limits for proceedings and limitation periods from the date of that decision until the date on which the ruling of the Constitutional Court is notified to the court that posed the preliminary question.[40]

A court is generally under an obligation to refer the issue to the Constitutional Court if a question on the constitutionality of a legislative act comes before it. The Special Act nonetheless provides for several exceptions to the foregoing rule, some of which do not apply to the Court of Cassation and the Council of State.[41]

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[30] Title II of the Constitution enumerates the rights and freedoms of the Belgians.
[31] Articles 170 and 172 of the Constitution set the principles of legality, viz. non-discrimination in tax related matters.
[32] Article 191 of the Constitution extends the protection of most of the rights and freedoms to foreigners on Belgian soil.
[33] Cass. 20 april 1950, *Arr. Cass.*, 1950, 517; J. Velaers, *Van Arbitragehof tot Grondwettelijk Hof* (Antwerpen/Apeldoorn, Maklu, 1990) p. 50; I. Verougstraete and A. De Wolf, 'De wet uitgelegd door de rechter: een neveneffect van de democratie', in A. Arts, et al., eds., *De verhouding tussen het Arbitragehof, de Rechterlijke Macht en de Raad van State* (Bruges/Brussels, Die Keure/La Charte 2005) p. 55-72 at p. 64-65.
[34] Art. 5 of the Special Act on the Constitutional Court.
[35] Art. 3 § 1 of the Special Act.
[36] See Art. 19 et seq. of the Special Act.
[37] Art. 8 § 1 of the Special Act.
[38] Art. 8 § 2 of the Special Act.
[39] Art. 9 § 2 of the Special Act.
[40] Art. 30 of the Special Act.
[41] Art. 26 § 2 of the Special Act.

Significantly, though, the acts of ratification of a treaty establishing the European Union or the ECHR cannot be the object of a request for a preliminary ruling.[42] Thus, the issue of unconstitutionality of the Convention can therefore not be raised before the Constitutional Court.

The court of law which posed the preliminary question and any other court of law passing judgment in the same case has to comply with the ruling given by the Constitutional Court in the settlement of the dispute in connection with which the preliminary question was lodged.[43] If the Constitutional Court decides that the act in question conflicts with the abovementioned provisions of the Constitution, the referring court must no longer take this act into consideration in its further adjudication of the case. The act in question will formally be maintained in the legal system, but a new six-month term commences in which an action for annulment of the act can be brought by the federal Council of Ministers, by the Government of a Community or Region, by the President of the respective legislative bodies upon request of two thirds of their members, and by any party with a justifiable interest.[44]

As to administrative acts, Article 159 of the Constitution provides that 'courts apply general, provincial or local decisions and regulations only if they are in accordance with the law'. Thus, ordinary courts of the judiciary as well as administrative courts and the Council of State have the competence to review administrative acts for conformity with the Constitution; they are obliged to refuse application of an administrative act that violates the Constitution. This is the effect of the so-called 'exception of illegality'.[45] According to the case law of the Council of State, Article 159 of the Constitution does not apply to individual decisions.[46] The Court of Cassation, though, holds the opposite view.[47]

Ordinary courts do not have the competence to annul an administrative act that is not in accordance with the law; they may only refuse to apply such acts. The Council of State has the exclusive competence to annul administrative acts that violate higher norms, such as the Constitution. An action for annulment must in general be introduced within a sixty-day time limit.

2.b. If they are competent to do so, what system of constitutional review is used, i.e.:

- **a system of concentrated review (with a constitutional court having the final say on the interpretation of the constitution)**
- **a decentralized system (where all courts have the power to decide on the constitutionality of acts of parliament)**
- **anything in between?**

As explained above, with respect to legislative acts the Belgian legal order combines a centralised review mechanism (entrusted to the Constitutional Court) with a decentralised system of preliminary rulings (by the other courts). With respect to administrative acts, all ordinary courts and administrative courts are competent to exercise constitutional review.

2.c. If they are competent to do so, is there:

- **a system of *a priori review*, i.e. review of compatibility before an act is adopted by parliament (e.g. advice by the Council of State)**
- **a system of *ex post* review**

If so, what kind of procedures are in place:

[42] Art. 26 § 1*bis* of the Special Act.
[43] Art. 28 of the Special Act.
[44] Art. 4 § 2 of the Special Act.
[45] J. Theunis, *De exceptie van onwettigheid* (Brugge, Die Keure 2011) p. 777.
[46] See e.g. Council of State 14 October 2004, no. 136.037.
[47] See e.g. Cass. 2 December 2002, no. C.98.04.60.N.

- **abstract and/or concrete control of norms by direct appeal?**
- **abstract or concrete control of norms by means of preliminary questions?**
- **a combination of *a priori* and *ex post* review?**

The Belgian system includes an *a priori* review mechanism, entrusted to the Legislation Section of the Council of State. The Council issues advisory opinions to the executives and the parliamentary assemblies on the conformity of draft legislation and draft regulations with the higher norms in the legal order.[48] The Council of State is always required to consult on bills to be sent to parliament, including the acts of approval of international treaties; for draft regulations, the consultation of the Council of State is required in principle, but the enacting authority may invoke urgency as a justification for not consulting the Council of State. The *a priori* review by the Council of State is necessarily abstract in nature.

As far as *ex post* review is concerned, reference is made to what is stated above. With respect to legislative acts, the Belgian legal order combines a centralised constitutional review system (entrusted to the Constitutional Court) with a decentralised system of preliminary rulings. The Constitutional Court exercises an abstract control of norms in both annulment and preliminary ruling proceedings. When examining an exception of illegality of an administrative act, based on the Constitution, the ordinary courts and the administrative courts perform a concrete control of norms.

3.a. Can you briefly characterise the status of international law (treaties, decisions/resolutions by international organisations, customary international law) in the constitutional order? Do treaties, decisions/resolutions by international organisations and/or customary law form part of the law of the land?

The Belgian legal order may, in general, be characterised as a monist system, despite having some dualist elements.[49]

In a 1906 judgment, the Court of Cassation ruled that customary international law is part of the Belgian legal order, without any requirement of approval by the legislature or publication.[50]

A treaty, on the other hand, must be approved by both the Senate and the House of Representatives at the federal level and/or the Parliaments on the federated levels and be published to take effect and become part of the domestic legal order in its entirety.[51] A treaty that has not been approved by the respective legislatures will not have binding force in the internal legal order and may not be applied by the courts.[52] This, however, does not mean that a treaty provision can be applied in the domestic legal order without the need for implementing measures. It is for the courts to decide whether an international law provision has a direct effect, *i.e.* whether they can give it a direct effect. The conditions for 'direct effect' have been set out by the Court of Cassation as follows: 'the notion of "direct effect" (…) implies that the obligation undertaken by (the) State is expressed in a complete and precise way and that the contracting parties had the intention to give to the treaty the purpose of granting subjective rights or imposing obligations on individuals'.[53]

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[48] See in general Alen and Muylle, *supra* n. 2, p. 476.
[49] See in general J. Wouters and D. Van Eeckhoutte, 'Doorwerking van internationaal recht in de Belgische rechtsorde. Een overzicht van bronnen en instrumenten', in J. Wouters and D. Van Eeckhoutte, *Doorwerking van internationaal recht in de Belgische rechtsorde*, (Antwerpen/Oxford, Intersentia 2006) pp. 3-82.
[50] Cass. 25 January1906, *Pas.* 1906, I, 95; Wouters and Van Eeckhoutte, *supra* n. 49, p. 15.
[51] Art. 167 §§ 2 and 3 of the Constitution; Cass. 11 December 1953, *Arr. Verbr.* 1954, 252.
[52] This is so even if the treaty has in the meantime been ratified by Belgium and became binding on the international level. See Cass. 12 March 2001*, Arr. Cass.* 2001, 395.
[53] Cass. 21 April 1983, Revue critique de jurisprudence belge (1985), p. 22.

Thus, the Court of Cassation lays down two separate and cumulative conditions for direct effect of a treaty provision:

- a subjective element, *i.e.* whether the authors of the treaty in question intended to grant subjective rights to the individuals;
- an objective element, *i.e.* whether the provision in question is sufficiently complete and clear in order to be invoked before a national judge.

A legal norm may only result in subjective rights if a specific legal duty is imposed directly on a third party by a rule of objective law, in which the claimant has an interest.[54]

The Court of Cassation makes a distinction between negative obligations and positive obligations deriving from treaty provisions. Where a treaty provision imposes on the States a duty not to interfere with a fundamental right, it has direct effect; where the same treaty provision imposes a positive duty on the States to take measures to protect that fundamental right, thereby leaving the States various possibilities to achieve the required result, it does not have direct effect.[55]

The Council of State sometimes holds to a broader definition of 'direct effect'. For the Council of State, in a number of cases, the direct effect of a treaty provision is not limited to the mere question whether the provision grants subjective rights to the individual; a norm of international or supranational law has direct effect *'in case that norm can be applied in the internal legal order, without any substantive internal implementing measure'.*[56] Where a norm imposes upon the States a sufficiently precise duty to refrain from taking certain action, it may therefore have direct effect.[57] In other cases, however, the Council of State adopts a view that is comparable to that of the Court of Cassation, where it links the direct effect to the creation of subjective rights for the individuals.[58] Nonetheless, when the Council of State is called upon to examine pleas for the annulment of administrative acts, its competence is confined to verifying the conformity of administrative acts with higher norms, including provisions of the ECHR.[59] The question whether or not individuals can derive subjective rights from international treaty provisions that have direct effect should therefore, in principal, not arise before the Council of State. Some authors even argue that the Council of State should abandon the condition of direct effect for international law provisions that are binding upon Belgium.[60]

The opinion of these authors is in line with the broad approach taken by the Constitutional Court. For the Constitutional Court the question whether a given provision of international law has direct effect does not arise at all. In cases where it has to rule on the conformity of national legislation with fundamental rights provisions guaranteed in the Constitution, read in light of international law provisions, the Constitutional Court has stated several times that it does not need to examine whether a

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[54] See Cass. 20 December 2007, no. C.06.0574.F and no. C.06.0596.F.

[55] See, with respect to Art. 8 ECHR, Cass., 10 May 1985, *Pas.*, 1985, I, no. 542, opinion adv.gen. A. Tillekaerts; Cass. 6 March 1986, *Pas.*, 1986, I, p. 852. For other cases in which the direct effect has been denied to treaty provisions imposing positive obligations on the States, see Cass., 17 January 2002, no. C.98.0125.N; Cass., 25 September 2003, no. C.03.0026.N; Cass., 26 May 2008, no. S.06.0105.F.

[56] Council of State 5 July 2001, no. 97.477; Council of State 27 January 2009, no.189.802.

[57] Council of State 28 April 2008, no. 182.454.

[58] See e.g. Council of State 16 October 1997, no. 68.914; Council of State, 28 May 2002, no. 107.085.

[59] According to Art. 14 of the Coordinated Laws on the Council of State, the Council may suspend and annul unlawful administrative acts ('administratieve handelingen') that violate higher norms, including international law provisions. An administrative act which is incompatible with a right or freedom guaranteed in the ECHR will be suspended or annulled. The focus is on the legality of the challenged act.

[60] See P. Martens and B. Renauld, 'L'interprétation et la qualification de la norme de contrôle et de la norme contrôlée', in A. Arts et al., eds., *De verhouding tussen het Arbitragehof, de Rechterlijke Macht en de Raad van State* (Brugge, die Keure 2006) p. 19, where they state: "Le Conseil contrôle la légalité des actes des autorités, qui doivent en toute hypothèse se conformer aux engagements internationaux de la Belgique. Au contentieux objectif, l'effet direct ne serait donc pas une condition pour exercer un contrôle de la conformité d'une loi à une disposition de droit international".

treaty has direct effect in the internal legal order, but that it has to rule on the question whether the legislator has violated the international obligations of Belgium in a discriminatory manner.[61] For the Constitutional Court to be able to examine whether a provision of national law is compatible with a treaty provision, it is therefore sufficient that the treaty is binding on Belgium.[62]

It seems that, following the case law of the Court of Cassation, the notion of 'direct effect' of a norm is often narrowed to the capability of the norm to create subjective rights for individuals. Norms of objective law, however, can be applied –and thus have 'effect'- outside the context of subjective rights. Norms can indeed be relevant, not because they give rise to subjective rights (and corresponding obligations), but because they place limits on the powers of public authorities. Where such limits are imposed by norms of international law, they can be applied directly in the domestic legal order, as is accepted by the Constitutional Court and, in certain cases, the Council of State. It seems that in that sense they have 'direct effect', notwithstanding the fact that they do not create subjective rights.

Decisions/resolutions by international organisations are part of the national legal order, as far as and to the extent that they are binding.[63] Judgments of the ECtHR, by contrast, are formally not part of the Belgian legal order.[64] The Court of Cassation nevertheless accepts that the interpretation of a treaty provision by an international judge is part of the norm itself.[65]

3.b. If so, what rank do treaties, decisions/resolutions adopted by international organisations and/or customary international law have in the national hierarchy of norms? Is there some kind of hierarchy?

In its landmark *Franco-Suisse Le Ski* judgment of 27 May 1971, the Court of Cassation held the view that provisions of international treaties with direct effect take precedence over a norm of national law.[66] A national judge must therefore refuse to apply a norm of national law, including a statutory norm that is not in conformity with a norm of international law, which has direct effect in the internal legal order. International law therefore ranks higher than national legislative and administrative acts.

The question arises whether the foregoing applies to the Constitution as well, *i.e.* whether international law takes precedence over the Constitution.[67]

From a formal point of view, this question does not arise before the Constitutional Court, since its competence is limited to the review of legislative acts for conformity with the Constitution. However, the competence of the Court includes the review of acts approving a treaty, by virtue of which the Court may carry out an indirect constitutionality review of the various provisions of that treaty.[68] According to the Court, the review of such an act – which merely states that the treaty in question 'shall produce its full and entire effect' – entails an examination of the content of the relevant provisions of the international instrument. The legislature may not pass legislation that violates the Con-

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[61] Const. Ct., 22 July 2003, no. 106/2003; Const. Ct., 19 July 2004, no. 92/2004; Const. Ct. 24 November 2004, no. 189/2004.
[62] See e.g. Const. Ct., 15 July 1993, no. 62/93; Const. Ct., 20 February 2002, no. 41/2002.
[63] Wouters and Van Eeckhoutte, *supra* n. 49, p. 18.
[64] Wouters and Van Eeckhoutte, *supra* n. 49, p. 17.
[65] Wouters and Van Eeckhoutte, *supra* n. 49, p. 22-25.
[66] Cass. 27 May 1971, *Arr. Cass.* 1971, 959.
[67] For an extensive answer to this question see P. Popelier, 'De verhouding tussen de Belgische Grondwet en het international recht' in R. Andersen et al. (eds.), *En hommage à Francis Delpérée. Itinéraires d'un constitutionnaliste* (Bruylant – Brusse, 2007) p. 1231-1254; A. Alen and J. Clement, 'De hiërarchie der rechtsnormen' in A. Alen and P. Lemmens, *Staatsrecht* (Brugge, Die Keure 2006) p 5-26.
[68] See for the first judgment on the issue Const. Ct. 16 October 1991, no 26/91. According to Art. 3 § 2 of the Special Act, "actions for full or partial annulment of a statute, decree or rule referred to in Article 134 of the Constitution by which a convention is ratified shall only be admissible insofar as they are instituted within sixty days after the publication of the statute, decree or rule referred to in Article 134 of the Constitution".

stitution, either directly or indirectly, by consenting to a treaty that would infringe the Constitution.[69] It has therefore been argued that accordingly, the Constitution takes precedence over international law provisions. The Court nevertheless takes into account the fact that 'the measure under review is not a unilateral sovereign act but a convention that also produces legal effects outside the domestic order'.[70] Whatever the exact relationship between the Constitution and international treaties may be, it should be noted that not a single treaty provision has been found unconstitutional so far.

The Court of Cassation for its part has endorsed the priority of international law over the Constitution on several occasions. In a judgment of 9 November 2004, the Court of Cassation held explicitly that 'the ECHR takes precedence over the Constitution'.[71] In two judgments of 16 November 2004 the Court added that 'the treaty with direct effect has priority over the Constitution'.[72]

According to the Legislation Section of the Council of State, the provisions of a treaty that is the object of a draft act approving of that treaty must be in conformity with the Constitution, since it is by virtue of the Constitution that those provisions will take effect in the internal legal order.[73] The Administrative Litigation Section of the Council of State, however, seems to have endorsed the priority of international law over the Constitution.[74]

The existence of diverging views of the courts may at first sight seem contradictory, but it is, in fact, a question of chronology rather than priority. Indeed, it is by virtue of the acts of approval that international treaties have binding effects in the domestic legal order. The *a priori* and *a posteriori* constitutional review of these acts by the Council of State, viz. the Constitutional Court, relates to the question whether or not Belgium has acted in conformity with the Constitution on the international level. Once this question is answered in the affirmative, Belgian courts accept the priority of international law over domestic law.

3.c. If international law is not part of the law of the land, what guarantees are there that the state will comply with its international obligations under treaties, decisions/resolutions by international organisations, or customary international law?

Since international law is part of Belgian law, this question does not apply.

3.d. Do the competent courts apply treaties, decisions/resolutions adopted by international organisations and/or customary international law as such (i.e. as sources of international law) or are they transformed into sources of national law in the process of incorporation? Are there any differences in practical consequences between the different approaches? Or is this a mere academic question without practical consequences?

For a treaty to take effect it must be approved by the competent legislative assemblies. However, once the treaty has been approved and ratified, it is the treaty as such that will be applied. Decisions and resolutions adopted by international organisations are applied as acts of international law. As explained above, customary international law can be applied as such, without any incorporating measure. The question seems to be academic.

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[69] Const. Ct. 3 February 1994, no 12/94.
[70] Same judgment; Const. Ct.. 4 February 2004, no. 20/2004.
[71] Cass. 9 November 2004, no. P.04.0849.N.
[72] Cass. 16 November 2004, nos. P.04.1127.N and P.04.1127.N.
[73] Council of State, Legislation Section, opinion of 6 May 1992, *Parl. Doc.* House of Repres., sess. 1991-92, no. 482/1, pp. 69-72; Council of State, Legislation Section, opinion of 21 April 1999, *Parl. Doc*. Senate, sess. 1999-2000, no. 2-329/1, pp. 95-99.
[74] See Council of State 5 November 1996, no 62.922, as discussed in Popelier 2007, *supra* n. 67, p. 1239-1240.

3.e. Would you characterise your constitutional system as monist, dualist or a hybrid system? This question has nothing to do with priority, but only with status as such.

It follows from our previous answers that the Belgian constitutional system is to be characterised predominantly as a monist system.

4. To what extent and how are the national courts empowered to review the compatibility of the constitution, acts of parliament, lower legislation, and other decisions taken by public authorities with treaties, decisions/resolutions adopted by international organisations and/or customary international law?
If they are:
4.a. Are all courts competent to do so (i.e. a decentralised system of judicial review) or is the competence limited to designated judicial bodies (e.g. a constitutional court or the highest courts)?

It follows from Article 1 of the Special Act on the Constitutional Court, that the Constitutional Court does not have any competence to rule directly on the conformity of national legislative acts with provisions of international law; its only task is to rule on the constitutionality of legislative acts.

The Constitutional Court nevertheless deems itself competent to read constitutional rights in conjunction with analogous norms of international law. In its case law, the Constitutional Court has constantly stated that in such case "the guarantees laid down in (a given) treaty provision (…) form an inextricable whole with the guarantees that are laid down in the constitutional provisions. The Court therefore, when reviewing the conformity with these constitutional provisions, takes into account the international provisions that guarantee analogous rights or freedoms".[75]

In addition, where a fundamental right is invoked that is not included in Title II of the Constitution, but is nevertheless guaranteed in a norm of international law, the Constitutional Court applies an indirect review of compatibility with that norm of international law, through a review of compatibility with Articles 10 and 11 of the Constitution, read in conjunction with the relevant norm of international law. Articles 10 and 11 of the Constitution guarantee equality and non-discrimination, respectively. According to the Court, where there is a difference in treatment between two categories of persons, and where the treatment of one group violates international law, the difference in treatment cannot be justified and constitutes discrimination.[76]

All the other courts, *i.e.* the ordinary courts and the administrative courts, can review the compatibility of legislative acts, regulations and other decisions taken by public authorities with treaties, decisions or resolutions adopted by international organisations and customary international law. If it is argued before an ordinary or an administrative court that a provision of national legislation infringes a right or freedom that is protected by the Constitution as well as by an international law provision, that court must, in principle first refer a question on conformity with the Constitution to the Constitutional Court, according to the procedure set out in Article 26 §4 of the Special Act of 6 January 1989 on the Constitutional Court.[77]

As to administrative acts, the exclusive competence to declare null and void an administrative act that violates international law provisions rests with the Council of State.

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[75] See Const. Ct. 14 December 2005, no. 189/2005.
[76] Const. Ct. 13 October 1989, no. 23/89, 13 October 1989. See in particular Const. Ct. 23 May 1990, no. 18/90, as to treaty provisions.
[77] For the relevant text of Art. 26 of the Special Act, see further the answer to question 10.

All courts, however, must, pursuant to Article 159 of the Constitution, refuse to apply administrative acts that violate a provision of international law.

It is not clear to what extent the courts would have the competence to review constitutional provisions for compatibility with international law provisions. This, however, seems to be a largely theoretical issue.

4.b. Are the courts competent to give priority to international law if national law conflicts with treaties, decisions/resolutions adopted by international organisations and/or international customary law? If so:

- **Is this competence based on national (constitutional) law? Or is it inferred from the nature of international law (e.g. the nature of self-executing treaties or the principle of *pacta sunt servanda*)?**
- **Which formal competences do the courts have to give such priority (e.g. disapplying national law in the case at issue, declaring national law null and void)?**
- **Is there a difference between priority over legislation/acts of parliament and priority over the constitution?**
- **Does declaring an act null and void have *ex tunc* effect or *ex nunc* effect, or is it possible for the court to set a time limit for the legislature to make amendments before the act loses its legal effect?**

The Constitutional Court does not have the competence to rule on the conformity of national legislative acts with the international law directly, but – as explained above – may take provisions of international law into account in its examination of whether national legislation is compatible with the Constitution.

The annulment of legislative acts by the Constitutional Court normally has an *ex tunc* effect. However, according to Article 8 § 2 of the Special Act, the Constitutional Court may, where it so deems necessary, specify which effects of the nullified provisions are to be considered maintained or provisionally maintained for the period determined by the Court. [78]

It is, on the contrary, for the ordinary courts and the administrative courts, to refuse to apply legislative acts that violate international law provisions.[79] Thus, they may directly review legislative acts for compatibility with international law. The refusal to apply a legislative act that violates a provision of international law has implications *inter partes*, which means that the act remains part of the internal legal order. The ordinary courts and the administrative courts can also refuse to apply administrative acts if they are found in violation of international law; the Council of State is moreover competent to annul administrative acts if they are found in violation of international law.

The annulment of an administrative act by the Council of State normally has an *ex tunc* effect. However, according to Article 8 § 2 of the Special Act, the Constitutional Court may, where it deems necessary, specify which effects of the nullified provisions are to be considered maintained or provisionally maintained for the period determined by the Court. Like the Constitutional Court, the Council of State may specify which effects of a nullified provision are to be considered maintained in relation to administrative acts of general application. These possibilities to restrict the retroactive effect of rulings are general in their application, and are not specifically designed for questions of the violation of international law.

The refusal by a national court to apply an administrative act has effects i*nter partes.*

[78] Popelier 2008, *supra* n. 29, p. 370-378.
[79] Cass. 27 May 1971, *Pas.* (1971), I, p. 886, opinion advoc.-gen. W.J. Ganshof van der Meersch.

According to the Court of Cassation, the priority of international law over domestic law stems from the presumption that the Belgian legislature, in adopting a legislative act, did not wish to violate norms of international law that are binding on Belgium; in case of a treaty, a State Party may not unilaterally change its obligations. It is therefore the nature of international law that is the basis for its priority over domestic law.[80] There is no written provision of Belgian law that establishes such priority.

5. Can parliament and/or the government play a role in determining whether an act of parliament which has been already been enacted and entered into force is compatible with the constitution and/or international law?

Questions relating to the compatibility of legislative acts with the Constitution or international law belong to the competence of the relevant courts (Constitutional Court for the compatibility of legislative acts with the Constitution; the other courts for the compatibility of legislative acts with international law, and of administrative acts with the Constitution and international law). There is no room for any involvement of parliamentary assemblies or governments in these determinations.

Of course, governments and – before the Constitutional Court – parliamentary assemblies can act as parties in court proceedings, and as such can make their views known to the court. This does not change the fact that they do not have a specific role to play with respect to the determination of the compatibility of legislative acts, regulations and other administrative acts with higher norms.

PART 2 – Competences and techniques of national courts to apply the ECHR (or avoid violations of the ECHR from occurring)

6.a. Do all the substantive provisions of the ECHR (including the various substantive protocols) have direct effect, i.e. are they self-executing/directly applicable?

There is unanimity in legal doctrine that most provisions of the ECHR and the Additional Protocols have direct effect.[81] By 'direct effect', we mean that the provisions of the treaty in question can be directly invoked and applied, in some way or another, in the domestic legal order.

The recognition of the direct effect of the provisions of the ECHR and the Protocols by the national courts, in particular the Court of Cassation and the Council of State, can take the following forms:

- explicit recognition of the direct effect of the provision in question by the respective courts;
- implicit endorsement of the direct effect of a provision by applying that provision to the facts of the case.

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[80] *Ibid*. See in particular the opinion of advoc-gen. W.J. Ganshof van der Meersch, at pp. 896-897.

[81] See J. Vande Lanotte, *Handboek EVRM – Deel 1. Algemene Beginselen* (Antwerp, Intersentia 2005) p. 95; M. Bossuyt, 'The direct applicability of international investments on human rights (with special reference to the Belgian and U.S. law)', in *De directe werking in het Belgisch recht van de internationale verdragen in het algemeen, en van de internationale instrumenten inzake mensenrechten in het bijzonder* (Brussels, Bruylant 1981) p. 63-78; E. Claes and A. Vandaele, 'L'effet direct des traités internationaux. Une analyse en droit positif et en théorie du droit axée sur les droits de l'homme', *Revue belge de droit international* (2001) pp. 411-491; H. Golsong, 'L'effet direct ainsi que le rang en droit interne, des normes de la Convention européenne des droits de l'homme et des décisions prises par les organes institués par celle-ci', in *Les recours des individus devant les instances nationales en cas de violation du droit européen des Communautés européennes des droits de l'homme dans la jurisprudence belge*, (Brussel, Bruylant 1978) p. 10-12 ; P. Lemmens, 'De Raad van State en de internationale verdragen over de rechten van de mens', *Tijdschrift voor bestuurswetenschappen en publiekrecht* (1987) pp. 367-386; J. Velu, *Les effets directs des instruments internationaux en matière de droits de l'homme, (*Brussel, Swinnen 1981) p. 189.

Based on the foregoing scheme, in practice all provisions of the ECHR and the Protocols that have binding force vis-à-vis the Belgian legal order have direct effect.[82] Some authors have expressed doubts about the direct effect of Article 13 of the ECHR, but recent case law of both the Court of Cassation and Council of State shows that the direct effect of Article 13 ECHR has meanwhile been accepted.[83]

As to the direct effect of Protocol no. 6, capital punishment was abolished by Article 14bis of the Constitution. Protocol no. 7 was ratified by the Belgian State in 2012 only; we are therefore unaware of any case law on the direct effect of its substantive provisions. There are, however, no reasons to believe that the courts would reject the direct effect of these provisions.[84]

6.b. To the extent that the substantive provisions of the ECHR and its Protocols are considered to be self-executing / directly applicable / have direct effect, does this *ipso facto* mean that these provisions result in subjective rights enforceable before the national courts? Or are there any substantive provisions that are considered to be self-executing, but may not result in subjective rights? If so, please give examples.

As to the meaning of the notion of "direct effect" in the Belgian legal order, we refer to question 3.

As has already been mentioned, the Court of Cassation makes a distinction between negative obligations and positive obligations deriving from treaty provisions. Where a Convention provision imposes on the States a duty not to interfere with a fundamental right, it has direct effect; where the same Convention provision imposes a positive duty on the States to take measures to protect that fundamental right, thereby leaving the States various possibilities to achieve the required result, it does not have direct effect.[85]

Before the Council of State, the question whether or not individuals can derive subjective rights from ECHR provisions that have direct effect should , in principal, not arise.

For the Constitutional Court the question whether a given provision of the ECHR has direct effect does not arise at all.

To conclude, it seems that, following the case law of the Court of Cassation, the notion of 'direct effect' of a norm is often narrowed to the capability of the norm to create subjective rights for individuals. Norms of objective law, however, can be applied – and thus have 'effect' – outside the context of subjective rights. Norms can indeed be relevant, not because they give rise to subjective rights (and corresponding obligations), but because they place limits on the powers of public authorities. Where such limits are imposed by norms of international law, they can be applied directly in the do-

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[82] For a review of the case law on the direct effect of Arts. 2 – 12 and 14 of the Convention and Arts. 1 and 2 of the First Protocol see K. Rimanque, *De toepassing van het Europees Verdrag voor de Rechten van de mens door de nationale rechter* (Wilrijk, UIA 1987). See in addition Council of State, 14 February 2006, no. 154.954 (Art. 1 ECHR); Council of State, 4 July 2002, no. 109.864 (Art. 2 ECHR); Council of State, 2 March 2001, no. 93713 (Article 3, First Additional Protocol); Council of State 28 October 2008, no. 185.919 (Art. 3 of Protocol n° 4); Council of State, 4 July 2003, no. 121.320 (Art. 2 of Protocol no. 4); Council of Alien Disputes 11 May 2009, no 27.142 (Art. 4 of Protocol no. 4).

[83] See inter alia Cass., 16 March 2000, no. C.990258.N (violation of Arts. 6 and 13 ECHR) and Council of State, 5 March 2012 no 218.306 (application of article 13 ECHR to the case). In older case law, the Court of Cassation rejected the direct effect of Article 13 of the Convention. See Cass., 18 December 1991, no. 8970, *Arresten van het Hof van Cassatie*, 1991-92, 215.

[84] See e.g. Cass. 20 February 1990, no. 3175*, Arresten van het Hof van Cassatie*, 1989-90, 371, where the Court of Cassation accepted the direct effect of Article 14.5 of the ICCPR, which provides for the right of appeal in criminal matters.

[85] See, with respect to Art. 8 ECHR, Cass., 10 May 1985, *Pas.*, 1985, I, no. 542, opinion adv.gen. A. Tillekaerts; Cass. 6 March 1986, *Pas.*, 1986, I, p. 852. For other cases in which the direct effect has been denied to treaty provisions imposing positive obligations on the States, see Cass., 17 January 2002, no. C.98.0125.N; Cass., 25 September 2003, no. C.03.0026.N; Cass., 26 May 2008, no. S.06.0105.F.

mestic legal order, as is accepted by the Constitutional Court and, in certain cases, the Council of State. It seems that in that sense they have 'direct effect', notwithstanding the fact that they do not create subjective rights.

6.c. If some of the substantive provisions of the ECHR and its Protocols are considered to be of such a nature that they can only be implemented by means of legislative measures, are the national courts nevertheless competent to apply those provisions to establish state responsibility in cases where those provisions have been violated?

As set out in our previous answers, all provisions of the ECHR and Protocols that are binding on Belgium seem to have direct effect. Those provisions may thus be invoked before the national judge without any national implementing measure.

It is true, however, that the State may be obligated to take positive measures, and that in such a situation it can normally choose between various means to achieve the result required under the ECHR or a Protocol. The question may arise of the extent to which the State can incur liability for not having taken such measures, or for not having taken adequate measures.

Recently, for example, the Belgian Court of Cassation held that the State was responsible in a case in which it failed to comply with its positive obligations under Article 6 para. 1 ECHR.[86] The Court of Cassation stated that the separation of powers, which guarantees a balance between the different powers of the State, does not entail any general exemption for the State from the obligation to repair all damages caused to a third party in the execution of its legislative powers; therefore, a court that receives a claim for damages caused by a wrongful interference with a right laid down in a higher norm that imposes a specific duty on the State, such as article 6.1 ECHR, is competent to examine whether the legislature has exercised its powers appropriately, in order for the State to comply with that norm, even if the legislature has been allowed a certain margin within which it may decide what means to deploy to ensure compliance with that norm.

If so, which remedies are possible?

1. **Are the national courts competent to order the state or its bodies to compensate for the damage caused by violations of non-self-executing provisions of the ECHR and its Protocols?**
2. **Are the national courts competent to order the State to adopt (legislative) measures which are necessary to implement non-self-executing provisions of the ECHR and its protocols?**

Since all provisions of the ECHR and its Protocols are self-executing, this question does not apply as such. However, it should be mentioned that according to the case law of the Court of Cassation, a violation of a norm of international law that has direct effect in the internal legal order may be qualified as a tort in the sense of Articles 1382 and 1383 of the Civil Code, and thus give rise to an obligation to compensate for any damage caused by the tortuous act.[87] This also applies to a violation of the ECHR.[88]

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[86] Cass., 28 September 2006, no. C.02.0570.F.

[87] Cass. 14 January 2000, no. C.98.0477.F; Cass. 23 November 2011, no. C.00.0066.F. See on the issue J. Wouters and M. Vidal, 'De rechter als hoeder van het internationaal recht: recente toepassingen van internationaal recht voor Belgische hoven en rechtbanken' , para. 13, available at www.law.kuleuven.be/iir/nl/onderzoek/wp/WP92n.pdf.

[88] See e.g., Court of first instance Kortrijk, 28 June 2011, *T.Straf. 2011*, pp. 273 – 291, where the judge ordered the State to compensate for damages caused by a violation of the right to trial within a reasonable time, as protected under Article 6 § 1 ECHR.

For the purpose of this question, moreover, it must be mentioned that, formally speaking, national courts do not have any competence under Belgian law to order the State to adopt legislative measures. Nevertheless, the Constitutional Court developed a practice whereby a lacuna in the legal order may, under certain conditions, amount to a violation of the Constitution, possibly read in conjunction with provisions of the ECHR and its Protocols as the occasion arises.[89] The Constitutional Court ruled, for instance, that the national legislation according to which a child is obliged to reside in a federal refugee centre amounted to a violation of Article 22 of the Constitution, taken in conjunction with Article 8 ECHR, due to the absence of a statutory provision which allowed the parents to reside in the same centre.[90] In another case the Constitutional Court ruled that the absence of a statutory provision that would allow the judge to charge to the claimant (in civil proceedings) or the complainant (in criminal proceedings) the fees and expenses necessary for the defence of the respondent (in civil proceedings) or defendant (in criminal proceedings where damages are claimed) if they lost the case, was in violation of Articles 10 and 11 of the Constitution, read in conjunction with Article 6 ECHR.[91] A third example relates to the Act of 16 June 1993 on the punishment of serious breaches of international humanitarian law.[92] In a 2005 judgment, the Constitutional Court held that there was no reasonable justification for the fact that only the Federal Prosecutor was entitled to decide whether or not to initiate proceedings for certain international crimes, without any supervision by an independent, impartial judge of his decision not to initiate proceedings, amounted to a violation of Articles 10 and 11 of the Constitution, read in light of Article 6 ECHR.[93] In its judgment, the Constitutional Court nevertheless maintained the effects of the provisions declared null and void until 31 March 2006, in order to allow the legislature to amend the act and cease the unconstitutionality.

Thus, although formally the Constitutional Court does not have the competence to order the legislature to take specific legislative measures, its finding of a lacuna has comparable effects. Indeed, the Court may sometimes even go as far as to indicate rather specifically, in the reasons for its judgment, what kind of measure the legislature should take in order the fill the lacuna.[94]

7. The case law of the ECtHR includes (positive) obligations on national courts to apply the Convention in relations between private parties (i.e. in horizontal relationships). Courts must refrain from interpreting contractual obligations in violation of the ECHR (*Khurshid Mustafa & Tarzibachi*, *Pla & Puncernau*). When deciding on horizontal conflicts between rights (e.g. the right to freedom of expression and the right to respect for one's reputation) they have to take account of the ECHR, and sometimes they are required to interpret national law in a specific manner (e.g. family law cases should always be decided in concreto, taking the best interests of the child into account). Do the national courts indeed apply the relevant ECHR provisions (or the corresponding provisions of the incorporating act) to cases between private parties, in compliance with the case law of the ECtHR?

[89] See in general J.-C. Scholsem, 'La Cour d'arbitrage et les 'lacunes législatives'' in A. Arts et al., eds., *De verhouding tussen het Arbitragehof, de Rechterlijke Macht en de Raad van State* (Brugge, Die Keure 2006) p. 213 – 237; Popelier 2008, *supra* n. 29, p. 65.
[90] Const. Ct. 19 July 2005, no. 131/2005.
[91] Const. Ct. 19 April 2006, no. 57/2006.
[92] *Official Gazette*, 5 August 1993.
[93] Const. Ct. 23 March 2005, no. 62/2005.
[94] See, e.g., with respect to the impossibility for prosecutors viz. auditors in the Council of State to challenge decisions by their hierarchical superiors that are alleged to be 'veiled' disciplinary measures, Const. Ct. 18 February 2009, no. 27/2009, and Const. Ct. 10 March 2011, no. 36/2011. In both cases the Court, after having identified the lacuna, indicated that the legislature had to provide a possibility for judicial review. These judgments were not based on the ECHR, but the same approach could of course also be taken in cases where the complainant invoked a violation of an article of the Constitution in combination with an article of the ECHR.

It should first be mentioned that the theory of horizontal effect of fundamental rights is not entirely new to the Belgian legal order. The current Article 29 of the Constitution, which guarantees the inviolability of the confidentiality of letters, has been applied by the Belgian courts, including the Court of Cassation, to cases between private parties, long before the theory emerged at the European level.[95]

As to other fundamental rights and freedoms, including the provisions of the ECHR, recent examples of case law of the Court of Cassation and the Constitutional Court reveal that the theory of horizontal effect of fundamental rights is becoming increasingly prevalent, albeit not in a systematic way.

Notwithstanding the lack of competence to rule on disputes between private parties, the case law of the Constitutional Court is of particular importance in this regard. Indeed, in some recent judgments, the Constitutional Court seems to advance a theory on the foundations of the horizontal effect of anti-discrimination law, which could be generalised and applied to fundamental rights in general.[96] In a 2009 judgment the Constitutional Court held that the "principle of equality and non-discrimination is not a mere principle of good legislation and good administration. It is one of the foundations of a democratic state based on the rule of law".[97] The Court went on to add that the decisive criterion to judge whether a private individual is bound by the prohibition of discrimination is not any normative action taken by this individual, but his "dominant position, in fact or in law", which would allow him to violate the rights of others in a discriminatory manner. Thus, according to the Constitutional Court, the principle of equality and non-discrimination applies not only to public authorities; it also imposes obligations on private individuals, as soon as they hold a dominant position. One may deduce from the foregoing a general legitimation of the horizontal effect doctrine. It remains to be seen, however, whether the Court will also extend this theory to other fundamental rights.

The federal legislature seems to accept the horizontal effect of most fundamental rights. A parliamentary working group, charged to study Title II of the Constitution, was in 2007 in favour of including a 'transversal clause' in the Constitution. Stressing the three traditional obligations of the State (to respect, to realise and to protect), it suggested "to lay down explicitly the doctrine of positive obligations and of the horizontal effect in the Constitution".[98] At the time of writing, however, no further action has been taken.

The case law of the Court of Cassation reveals a more cautious approach. On several occasions the Court of Cassation has applied both constitutional and ECHR rights to private disputes, albeit not in a general or systematic manner.[99] Most cases relate to criminal proceedings, where the Court had to rule on the validity of evidence gathered by private parties, in light of Article 8 of the ECHR.[100] In a recent case in which the applicant raised a violation of Article 4 of the ECHR, the Court of Cassation held that a contractual clause that entails restrictions on a contracting party's right to freely exercise a professional activity (restrictions that go further than those provided by law), is null and void.[101] Although the Court did not explicitly refer to any fundamental right that would guarantee the freedom to exercise a professional activity, it is evident from the applicant's plea that the Court referred to, inter alia, Article 4 of the ECHR.

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[95] See P. Lemmens and N. Van Leuven, 'Les destinataires des droits constitutionnels', in M. Verdussen and N. Bonbled (eds.), *Les droits constitutionnels en Belgique*, Vol. 1 (Brussel, Bruylant 2011) pp. 131 et seq. See Cass. 27 February 1913, *Pas.* 1913, I, p. 123; Cass. 12 February 1951, *Pas.* 1951, I, p. 381; Cass. 21 October 2009, *Rev. trim. dr. fam.* 2010, p. 517.
[96] *Ibid.*, p. 131 et seq.
[97] Const. Ct. 12 February 2009, no. 17/2009 .
[98] *Doc. Parl.* House of Representatives sess 2006 – 2007, no. 51-2304/002, p. 4.
[99] For a comprehensive review, see N. Van Leuven, 'Derdenwerking van mensenrechten in de Belgische rechtsorde', in J. Wouters and D. Van Eeckhoutte, ed., *De doorwerking van het internationaal recht in de Belgische rechtsorde – Recente ontwikkelingen in een rechtstakoverschrijdend perspectief* (Antwerpen, Intersentia 2006) p.167; V. Van der Plancke and N. Van Leuven, 'La privatisation du respect de la Convention européenne des droits de l'homme: faut-il reconnaître un effet horizontal généralisé?', in A. Schaus (ed.), *Entre ombres et lumières: cinquante ans d'application de la Convention européenne des droits*

In the case law of the Court of Cassation, one can distinguish between two separate techniques to give horizontal effect to fundamental rights, including provisions of the ECHR.[102] In some cases, the Court relies on the direct horizontal effect of fundamental rights (or *unmittelbare Drittwirkung*). This is the case when it derives legal effects from a fundamental right that are directly applicable to private law relationships, without any national implementing measure. By way of example, we can refer to a 1981 judgment, in which the Court ruled that restrictions of freedom of association by a private entity, beyond the limits of the restrictions set by the Act of 24 May 1921 guaranteeing freedom of association, may constitute a violation of this freedom.[103] In other cases, the Court reverts to the indirect horizontal effect of fundamental rights (*mittelbare Drittwirkung*). This is the case when it applies a specific fundamental right through the traditional channels of private law, e.g. by interpreting and applying private law provisions in light of these fundamental rights. By way of example, we can refer to the abovementioned judgment of the Court of Cassation of 29 September 2008, in which the Court held that any contractual clause that, beyond the restrictions provided by law, restricts the freedom to exercise a professional activity has an illegal cause and therefore is null and void.

Given the lack of clarity on the part of the Court of Cassation, lower courts do not have any clear guidelines to apply fundamental rights provisions, including the ECHR, to disputes between private parties.[104] Some lower courts, for example, consider that fundamental rights do not apply to private disputes at all.[105] Other lower courts revert to the direct[106] or indirect[107] horizontal effect of ECHR provisions. In legal doctrine, there seems to be a clear preference for the indirect horizontal effects of fundamental rights.[108]

By way of example of cases accepting a horizontal effect of provisions of the ECHR, we can refer to the following cases[109]:

- Article 3 of the ECHR has been applied to disputes between private individuals on the supply of electricity or gas. Thus, the Court of Appeal of Brussels ruled that the supply of electricity and gas may affect human dignity, notwithstanding the fact that this does not imply free delivery; [110]
- as to Article 6 of the ECHR, the Brussels Court of Appeal ruled that a contractual clause that imposes an obligation to settle matters before an arbitrator, and which therefore implies a restriction on the right of access to a court, amounts to a violation of Article 6 ECHR; [111]

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*de l'homme en Belgique (*Brussels, Bruylant 2008) p. 247. See e.g. Cass. 6 April 1960, *Arr. Cass*. 1960, p. 722 on Article 16 of the Constitution (right to property); Cass. 29 September 1967, *Pas*., 1968, I, 9. 132 (application of the right to access to a Court in a contractual relationship between a company and its suppliers); Cass. 27 April 1981, *Pas.,* 1981, I, p. 964 (application of the right to freedom of association as protected under Article 27 of the Constitution between an employer and its employees).

100 Cass., 9 January 2001, *Juristenkrant* 2001 (25) p. 5 (Arts. 8 and 17 ECHR); Cass., 27 February 2001, *Arr. Cass.,* 2001, p. 371, *Pas.*, 2001, p. 368, *Computerr.,* 2001, p. 202, note J. Dumortier, *Rev. dr. pén.,* 2002, p. 251 (Art. 8 ECHR) ; Cass., 9 June 2004, *N.J.W.,* 2005, p. 342 (Art. 8 ECHR); Cass., 2 March 2005, *Computerr*., 2005, p. 258 , *J.L.M.B.,* 2005, p.1086 (Art. 8 ECHR).

101 Cass. 29 September 2008, *Pas.* 2008, p. 31, no. 7.

102 See Lemmens and Van Leuven, *supra* n. 95, p. 141.

103 Cass. 27 April 1981, *Pas.* 1981, I, p. 964.

104 See P. Lemmens and N. Van Leuven, 'Les droits constitutionnels en Belgique' in M. Verdussen and N. Bonbled, eds., *Les droits constitutionnels en Belgique*, Vol. 1 (Brussel, Bruylant 2011) p. 142.

105 See case law cited in Van der Plancke and Van Leuven, *supra* n. 99, p. 247.

106 *Ibid*.

107 *Ibid.*

108 K. Rimanque, 'Nationale bescherming van grondrechten,' *T.B.P.*, 1981, p. 41; K. Rimanque and P. Peeters, 'De toepasselijkheid van grondrechten in de betrekkingen tussen private personen – algemene probleemstelling', in K. Rimanque, ed., *De toepasselijkheid van de grondrechten in private verhoudingen* (Antwerpen, Kluwer 1982) p. 19; E. Dirix, 'Grondrechten en overeenkomsten', in K. Rimanque, ed., *De toepasselijkheid van de grondrechten in private verhoudingen* (Antwerpen, Kluwer 1982) p.49.

109 For an overview of relevant case law see Van Leuven 2006, *supra* n. 99, p. 167; Van der Plancke and Van Leuven, *supra* n. 99, p. 247; P. Bekaert, 'De toepassing van het EVRM door de Belgische rechtbanken op vlak van strafrecht en burgerlijk recht', in *Recht in beweging, 13de VRG Alumnidag 2006 (*Antwerpen, Maklu 2006) p. 266-298.

110 See e.g. Court of Appeal Liège 30 January 1985, *Journal des tribunaux* 1985, p. 526; Court of Appeal Brussels 25 February1988, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 1989, p. 1132.

– a violation of Article 8 of the ECHR has been raised in a case relating to a journalist's right to freedom of expression and the right of private individuals to privacy; [112]
– in trade union disputes Article 11 of the ECHR has sometimes been relied on. [113]

8. Are there examples of cases in which national legislation or national decisions have been set aside / declared null and void / disapplied because of a conflict with the ECHR?

Given the wide range of possibilities for the Belgian courts to review national legislation and decisions in light of international law, including the ECHR, many cases exist in which legislation and decisions were set aside, annulled or not applied by a national court.[114] In what follows we will, by way of example, examine some rulings of each of the highest courts.

Although formally the Constitutional Court does not have the competence to annul national legislation for lack of conformity with the ECHR, its jurisprudence contains numerous examples of cases in which national legislation was annulled because of a conflict with a provision of Title II of the Constitution taken in conjunction with and interpreted in light of the corresponding provision of the ECHR.

In a 2010 judgment, the Constitutional Court held that an absolute, permanent prohibition of advertising by political parties on radio and television constituted an unjustified restriction on the right to freedom of expression, as protected under Article 19 of the Constitution and Article 10 of the ECHR in so far as it may have the effect of denying certain groups access to an important means for making their positions known to the public.[115] In a 2011 judgment, the Constitutional Court held that the legal situation whereby a child can no longer challenge the presumption of paternity on the part of his mother's husband after the age of 22 or after the year following his discovery of the fact that his mother's husband is not his father, cannot be justified by the desire to protect family peace, given the non-existence of any family links and therefore violates Articles 10, 11 and 22 of the Constitution, taken in conjunction with Articles 8 and 14 of the ECHR.[116] In the same year the Constitutional Court ruled that a temporary exemption from the entry into force of a smoking ban for liquor outlets also offering pre-packed foods with a storage period of three months as well as for casinos violated Articles 10 and 11, Articles 23.3 and 23.4, and Article 22 of the Constitution, read in conjunction with Article 8 of the ECHR.[117]

The Court of Cassation ruled, in several judgments, that the former Article 185 § 2 of the Code of Criminal Procedure, which imposed an obligation on the accused to appear in person, violated Articles 6.1 and 6.3.c. of the ECHR, according to which the accused may appear through legal assistance of his own choosing.[118] As a consequence, the criminal judge had to allow the accused to be represented through legal assistance, even if the accused was not in the position to appear in person. Arti-

[111] Court of Appeal Brussels 4 October 1993, *Journal des procès* 1993 (247), p. 25.
[112] See e.g. Ct. First Instance Brussels 21 November 1990, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 1991, p. 24.
[113] See. e.g. Court of Appeal Brussels 22 March 2010, *Sociaalrechtelijke Kronieken* 2011, Vol. II, p. 71.
[114] Both the Court of Cassation and the Council of State endorsed the public order character of the ECHR, or at least some of its provisions. As a consequence, a court may have to raise a plea based on a violation of the ECHR by its own motion and, in addition, it is possible that such a plea may be raised for the first time during the cassation proceedings. See in general O. De Schutter and S. Van Drooghenbroeck, *Droit international des droits de l'homme devant le juge national* (Brussels, Larcier 1999) at p.23-24, referring to Cass. 18 September 1981, *Pas*. 1982,I, p. 98 and Council of State 8 October 1991, no. 37.832. See in addition Lemmens 1987, *supra* n. 81, p. 368.
[115] Const. Ct. 22 December 2010, no. 161/2010.
[116] Const. Ct. 31 May 2011, no. 96/2011.
[117] Const. Ct. 15 March 2011, no. 37/2011.
[118] Cass. 4 September 2001, P.98.0861.N; Cass. 16 March 1991, *Journal des tribunaux* (2000) p. 124 et seq. See in addition Cass. 9 March 1999, *Revue de droit pénal et de criminologie* (2000) p. 339 (relating to the incompatibility with Art. 6 of the Convention of Art. 421 of the Criminal Code).

cle 185 of the Code of Criminal Procedure has in the interim been amended to make it compatible with Articles 6 § 1 and 6 § 3 (c) of the ECHR.[119]

In a case in which an official was removed from office by a an administrative decision because of some statements he had made to a local newspaper, the Council of State held that the removal from office was a disproportionate sanction in the light of Article 10 § 2 of the ECHR and therefore amounted to an unlawful restriction of the official's right to freedom of expression.[120]

8.a. Can you estimate if this occurs frequently / sometimes / rarely?

This occurs frequently in cases before the Constitutional Court, but less frequently before the Court of Cassation and Council of State.

8.b. If constitutional review is possible: can you estimate if the constitution is used more often / just as often / less often than the ECHR as a basis for holding that legislation or decisions do not comply with fundamental rights norms?

As to constitutional review of legislative acts, it should be recalled that the Constitutional Court may review legislative acts only for their conformity with the Constitution. If a constitutional right is in substance entirely or partially also guaranteed by the ECHR, the constitutional provisions is read in light of the ECHR. For a right or freedom that is only guaranteed in the ECHR, the Constitutional Court has ascribed to itself the competence to review legislative acts in light of the provisions of the ECHR via Articles 10 and 11 of the Constitution.

The ordinary and administrative courts do not have the competence to review legislative acts for conformity with the Constitution; they may only review legislative acts in light of international law provisions, such as the ECHR. However, where it is claimed before the Court of Cassation or the Council of State that a legislative act violates a fundamental right which is protected in both the Constitution and the ECHR, the Court of Cassation resp. Council of State must refer the question to the Constitutional Court for a preliminary ruling. Thus, the discretion of the ordinary and administrative courts is considerably limited as to the review of legislative acts.

As to the constitutional review of administrative acts, there is no clear picture since the ordinary courts and the administrative courts, in particular the Council of State, may directly review these acts for conformity with the Constitution as well as with the ECHR. Where there is relevant case law of either the European Court of Human Rights or the Constitutional Court, the other courts may prefer to rely on the text for which there is clarifying case law.[121]

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[119] Art. 7 of the Act of 12 February 2003, *Official Gazette* 28 March 2003.

[120] Council of State, 12 March 2007, no. 168781.

[121] See for instance Council of State 1 October 2009, no. 196.540, where the applicants in a case relating to environmental protection invoked an infringement of Art. 23 of the Constitution and Art. 8 of the ECHR, but where the Council of State only reviewed the decision in light of Art. 8 of the ECHR.

8.c. Are there any examples where the court has declined to use its competence to set aside national legislation / decisions in order to respect separation of powers (between the courts and the legislature or between courts and administrative bodies) or the sovereignty of parliament?

As explained above, as a result of the *Franco-Suisse Le Ski* judgment of the Court of Cassation and Article 159 of the Constitution, national courts are under a duty to refuse to apply national legislation and decisions that violate international law provisions, including the ECHR. Therefore, if a national judge finds a violation of international law, he cannot but refuse to apply that norm of national law. The question therefore does not seem to arise under Belgian law. In particular, we are not aware of any decision whereby a court, after having found a violation of a provision of the ECHR, declares itself incompetent to draw the necessary conclusions from that finding. What could perhaps happen, is that the court might avoid a problem by declaring that there is no incompatibility with the ECHR, or even by declaring that the provision of the ECHR does not have any direct effect in the given situation.

9. Are the national courts competent to order the national legislature to bring national law into conformity with the ECHR by means of amending or introducing legislation?

The courts, including the administrative courts, do not have the competence to impose binding obligations on the legislature to change acts of parliament. They may only set aside national legislation that violates provisions of the ECHR. The Constitutional Court has the exclusive competence to declare acts of parliament null and void. The reaction of the legislature will depend on the reasoning in the Court's judgment and the consequences of the judgment, but the Constitutional Court does not have the competence to impose binding obligations to change acts of parliament.[122] As indicated above, however, the Constitutional Court may find a lacuna in the legislation, resulting in a violation of the Constitution, and such a finding obliges the legislature to take the necessary measures in order to fill the lacuna.[123]

10. Do national courts strive to interpret national law (including the national constitution) in harmony with the ECHR?

The Constitutional Court attaches particular importance to the provisions of the ECHR and the jurisprudence of the ECtHR for the interpretation of the rights and freedoms in the Constitution that are guaranteed entirely or partially in a similar manner. The Constitutional Court is not competent to rule on the conformity of national legislation with international law provisions. However, it reads the constitutional rights in conjunction with (analogous) provisions of Convention law. According to its constant case law, 'where a treaty provision that binds Belgium is similar in scope to one or more of the aforementioned constitutional provisions, the guarantees established by that treaty provision form an inseparable whole with the constitutional guarantees.'[124]

The ordinary courts and the administrative courts are under an obligation, where possible, to interpret domestic law provisions in such a way that they are compatible with relevant treaty provisions.[125] Thus, in interpreting domestic law provisions, they must have regard to the provisions of

[122] See F. Delpérée, 'Le suivi de la jurisprudence constitutionnelle par les Chambres législatives', *Chroniques de droit public* (2010) p. 378 et seq.
[123] See above, answer to question 6.c.
[124] Const. Ct. 14 December 2005, no. 189/2005.
[125] Cass. 12 February 2003, P.02.1139.F.. See in general Wouters and Van Eeckhoutte, *supra* n. 49, p. 145-243.

the ECHR where applicable. Where it is impossible to interpret domestic law in conformity with provisions of international law, which have direct effect in the internal legal order, the courts must refuse to apply the provisions of domestic law.[126]

Like the Constitutional Court, the Council of State reads constitutional provisions in accordance with the ECHR.[127] The Council, for instance, reads the principle of proportionality of Article 8 § 2 ECHR into Article 23, third paragraph, 2° and 4° of the Constitution (right to health and right to a healthy environment).[128] Moreover, the Council of State often refers to the case law of the Constitutional Court for the interpretation of constitutional rights. Since the Constitutional Court reads the constitutional provisions in accordance with analogous provisions of the ECHR, the Council of State's interpretations of these provisions are presumably also in harmony with the ECHR.[129]

11. Do national courts try to avoid conflicts with the ECHR by means of constitutional review or construing national law in conformity with the constitution (*Verfassungskonforme Auslegung*)?

The possibilities for a Belgian court to avoid conflicts with the ECHR are to a great extent determined by the combination in the Belgian legal order of a central constitutional review mechanism falling within the exclusive competence of the Constitutional Court (at least as far as legislative acts are concerned), with a more diffuse system of review in the light of international treaties, as a result of the Court of Cassation's jurisprudence, according to which any court may review national law in light of international law provisions. The Constitutional Court, on the other hand, does not have the competence directly to examine national legislation for compatibility with international law, although it may read the Constitution in the light of international law norms by which the Belgian State is bound. The other courts in addition are under an obligation to interpret national law, where possible, in conformity with the Constitution.[130]

Thus, in fundamental rights matters, there is an interaction between the ordinary and the administrative courts and the Constitutional Court. This interaction is currently the object of Article 26 § 4 of the Special Act of 6 January 1989 on the Constitutional Court.[131] That provision reads as follows:

> "§ 4. Where it is invoked before a court of law that a statute, decree or rule referred to in Article 134 of the Constitution infringes a fundamental right which is guaranteed in an entirely or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law, the said court of law shall first refer the question of compatibility with the provision of Title II of the Constitution to the Constitutional Court for a preliminary ruling.
> Notwithstanding the first paragraph, the obligation to refer a preliminary question to the Constitutional Court shall not apply:
> 1° in the cases referred to in paragraphs 2 and 3;
> 2° if the court of law finds that the provision of Title II of the Constitution has manifestly not been infringed;
> 3° if the court of law finds that it appears from a judgment delivered by an international court of law that the provision of European or international law has manifestly been infringed;
> 4° if the court of law finds that it appears from a judgment delivered by the Constitutional Court that the provision of Title II of the Constitution has manifestly been infringed."

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[126] Cass. 27 May 1971, *Pas.* 1971, I, p. 886.
[127] See in general Lemmens 1987, *supra* n. 81, p. 367-386.
[128] Council of State 17 November 2008, no. 187.998.
[129] See, e.g., Council of State 9 March 2009, no. 191.162, on the principle of legality in criminal matters, as guaranteed by Art. 12 of the Constitution.
[130] Cass. 20 April 1950, *Arr. Cass.* (1950) p. 517.
[131] Art. 26 § 4 as inserted by Art. 2 of the Special Act of 12 July 2009, *Official Gazette* 31 July 2009.

Thus, where it is argued before a court of law that national legislation infringes a fundamental right which is guaranteed both in the Constitution and the ECHR, the said court must, in principle, first refer the question of compatibility with the Constitution to the Constitutional Court for a preliminary ruling. An 'entirely analogous right' is a right with equal scope and equal conditions of restriction; a 'partially analogous right' is a right with a (partially) equal scope, and/or with different conditions of restriction.[132]

In practical terms, this means the following:[133]
– Articles 10 and 11 of the Constitution (principle of equality and prohibition of discrimination) is entirely analogous to Article 14 of the ECHR;
– Article 12 of the Constitution (right to freedom) is partially analogous to Article 5 of the ECHR;
– Article 13 of the Constitution (right to access to a court) is partially analogous to Article 6 § 1 of the ECHR;
– Article 15 of the Constitution (inviolability of one's home) is partially analogous to Article 8 of the ECHR;
– Article 16 of the Constitution (protection against expropriation) is partially analogous to Article 1 of Protocol No. 1 to the ECHR;
– Articles 19 and 25 of the Constitution (freedom of religion, of speech and of press) are partially analogous to Articles 9 and 10 of the ECHR;
– Article 22 of the Constitution (right to protection of private and family life) is partially analogous to Article 8 of the ECHR;
– Article 24 of the Constitution (right to education) is partially analogous to Article 2 of the Protocol No. 1 to the ECHR;
– Article 27 of the Constitution (right to freedom of association) is partially analogous to Article 11 of the ECHR;
– Article 29 of the Constitution (inviolability of the confidentiality of letters) is partially analogous to Article 8 of the ECHR.

It follows from the foregoing that, where it is argued before a domestic court that national legislation violates one of the above fundamental rights, the court must first (if need be on its own motion), refer the question of compatibility with the Constitution to the Constitutional Court. Article 26 § 4 of the Special Law nevertheless entails some exceptions to the foregoing obligation:
– if the Constitutional Court has already ruled on a question or appeal on an identical subject;
– if there is an *acte clair*, i.e. if the court of law finds that the provision of Title II of the Constitution has manifestly not been infringed;
– if there is an *acte éclairé*, i.e. if the court of law finds that it appears from a judgment delivered by the ECtHR that the provision of the ECHR has manifestly been infringed or if the court of law finds that it appears from a judgment delivered by the Constitutional Court that the provision of Title II of the Constitution has manifestly been infringed.

This is not to say that the ordinary or administrative court, in case the Constitutional Court does not find a violation of the Constitution, may not subsequently examine the national law for compatibility with the analogous provisions of the ECHR. Article 26 § 4 of the Special Act only establishes an order of priority; it does not affect the ordinary or administrative court's competence (and duty) to review

[132] J. Velaers, 'Artikel 26, § 4 van de bijzondere wet op het Grondwettelijk Hof: naar een nieuw evenwicht tussen de rechtscolleges bij samenloop van grondrechten,' *Tijdschrift voor bestuurswetenschappen en publiekrecht* (2010) p. 387-410.
[133] See J. Velaers, 'Samenloop van grondrechten: het Arbitragehof, titel II van de Grondwet en de internationale mensenrechtenverdragen,' *Tijdschrift voor bestuurswetenschappen en publiekrecht* (2005) at p. 304.

national legislation in light of the ECHR.[134] Article 26 § 4 of the Special Act therefore does not rule out different findings as between the ordinary or administrative court and the Constitutional Court on an analogous fundamental right (though formally guaranteed in two separate legal norms).[135]

In addition, Article 2, some elements of Article 6 and Article 12 of the ECHR and Article 3 of Protocol No. 1 to the ECHR are only guaranteed in the ECHR. Where it is argued before a court of law that a legislative act infringes one of these provisions of the ECHR, without invoking any provision of the Constitution, there will be no need for the court to refer the question to the Constitutional Court for a preliminary ruling. In such a case, the court will nevertheless be under an obligation to adopt, if possible, an interpretation that makes the statutory provision compatible with the ECHR.

As an answer to the question, one could say, in sum, that, in order to avoid conflicts with the ECHR, the Belgian legislature has opted for a cooperation mechanism between the ordinary and administrative courts and the Constitutional Court, in which the Constitutional Court holds the central competence to review national legislation for compatibility with the Constitution and analogous provisions of the ECHR, whereas the other judges, in second order, may review the legislation in light of the ECHR, provided they interpret the legislation in conformity with the ECHR, if that is possible.

12. Do national courts use EU law as a vehicle to review the compatibility of national law with the ECHR?

Since all provisions of the ECHR have direct effect, there is no need for a Belgian court to use EU law as a vehicle to review the compatibility of domestic law with fundamental rights that are also guaranteed by the ECHR.

In addition, the protection offered by EU law only applies if EU law is implemented or executed. This has been confirmed in a recent ruling of the Court of Cassation, where the Court referred to Article 51 of the Charter.[136] The Court added that the provisions invoked by the applicants, namely Articles 3 (right to integrity of the person) and 24.2 and 24.3 (rights of the child) of the Charter, did not have direct effect in the internal legal order.

A sample of recent case law of the Belgian courts shows that the provisions of the EU Charter are mostly invoked and/or applied in cases where there is no equal or analogous protection in the ECHR, such as the provisions on protection against unlawful dismissal,[137] protection of the rights of the child,[138] and protection in tax affairs.[139] As far as anti-discrimination is concerned, and in particular cases related to professional activities, EU law may still prove to be more effective than the ECHR. The Belgian anti-discrimination legislation is grafted onto European legislation.[140] In such cases, Belgian courts do not hesitate to refer to EU law and the case law of the ECJ.[141]

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[134] See Velaers 2010, *supra* n. 132, p. 406.
[135] See e.g. Council of State 2 July 2010, no. 206.397.
[136] Cass. 2 March 2012, no. C.10.0685.F.
[137] Const. Ct. 13 October 2011, no. 156/2011; Labour Court of appeal Antwerp 14 November 2011, *Sociaalrechtelijke kronieken (*2012) p. 46.
[138] Court of first instance Nivelles 6 April 2011, *Tijdschrift voor vreemdelingenrecht* (2011) p. 345.
[139] Const. Ct. 22 December 2011, no. 197/2011.
[140] See in general I. Verhelst and S. Raerts, 'Discriminatie op de arbeidsplaats : gewikt en gewogen. Een overzicht van de rechtspraak van de arbeidsgerechten betreffende de antidiscriminatiewetten van 10 mei 2003', *Oriëntatie* (2011) no. 4, p. 90.
[141] See e.g. Labour Court Brussels 19 October 2004, *Sociale Kronieken* (2005) p. 16, referring to the current Art. 157 of the Treaty on the Functioning of the EU and the judgment of the ECJ 8 April 1976, Case 43/75, *Defrenne* v. *Sabena.*

In addition it must be mentioned that Article 26 § 4 of the Special Act may not jeopardise the duty of national courts to apply EU law directly and to refer the case to the ECJ for a preliminary ruling if need be. This has been reaffirmed by the ECJ in a recent judgment.[142] Thus, Article 26 § 4 of the Special Act must be read in light of that judgment.[143]

13. Is there a preferential order in the use of techniques (i.e. treaty-conform interpretation, setting aside national law, ordering the legislature to amend legislation, constitutional review, *Verfassungskonforme Auslegung*) to avoid violations of the ECHR?

As our previous answers have explained, the possibility for a court to use certain techniques to avoid violations of the ECHR has to a certain extent been limited by the Special Act on the Constitutional Court. In cases where, with respect to a legislative act, fundamental rights are invoked that are guaranteed in both the Constitution and the ECHR, the court must first refer the question of compatibility with the Constitution to the Constitutional Court. As indicated above, the Constitutional Court applies a particular form of interpretation of the Constitution in the light of the ECHR. If the Constitutional Court does not find any violation of the Constitution, the ordinary or administrative court may still review the national legislation for compatibility with the provisions of the ECHR. The court will nevertheless be under an obligation to interpret the statutory provision in question in conformity with the ECHR, if possible. If a treaty-conform interpretation is not possible, the court may move on and refuse to apply the statutory provision. This, however, rarely occurs: in general, the ordinary and administrative courts will try to follow the assessment by the Constitutional Court, not only with respect to the provisions of the Constitution, but also with respect to the corresponding provisions of the ECHR.

The interpretation in conformity with the ECHR and the refusal to apply a statutory provision that is not in conformity with the ECHR also apply to the situation where the fundamental right invoked is guaranteed in the ECHR only.

PART 3 – Dealing with the judgments and decisions of the ECtHR

14. Do the national courts, when interpreting and applying ECHR provisions, refer to judgments/decisions of the ECtHR?

The Constitutional Court attaches particular importance to the case law of the ECtHR.[144] There are numerous judgments in which the Constitutional Court refers to the case law of the ECtHR.[145] By way of example, we can refer to a 2009 judgment, where the Court had to rule on a preliminary question of the Council of State relating to the constitutionality of a legislative provision allowing a political party to be temporarily deprived of part or all of the public subsidy to which it would normally be entitled, on the grounds of its manifest hostility to the rights and freedoms secured by the ECHR. In that judgment, the Court referred to up to 18 judgments of the ECtHR.[146] The Constitutional Court does not merely refer to the case law of the ECtHR, it ensures that its own case law is in conformity with it. As an example, we can refer to a 2007 judgment, where the Court ruled that the constitutional

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[142] ECJ 22 June 2010, Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli*.
[143] See on the issue Theunis, *supra* n. 45, p. 262 et seq.
[144] See in general, P. Martens, 'L'influence de la jurisprudence de la Cour européenne des droits de l'homme sur la Cour constitutionnelle,' *Publiekrechtelijke Kronieken* (2010) pp. 350 – 358 .
[145] See, e.g., the case law cited in A. Alen, K. Muylle and W. Verrijdt, 'De verhouding tussen het Grondwettelijk Hof en het Europees Hof voor de Rechten van de Mens', in A. Alen and J. Theunis (eds.), *Leuvense staatsrechtelijke standpunten* (Brugge, Die Keure 2012) footnote 94.
[146] See Const. Ct. 3 December 2009, no. 195/2009.

principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), read in conjunction with the right to a fair trial (Article 6 § 1 ECHR), were violated by a legislative provision requiring the courts to impose fines equivalent to ten times the amount of excise duty evaded, doubled for a repeat offence. The Court considered that the provision did not permit the criminal courts to reduce the fine in the event of mitigating circumstances and could have disproportionate effects, since it failed to set a maximum fine or a minimum one.[147] As a result of the *Mamidakis* judgment of the ECtHR of 11 January 2007, the Court reopened the debates in the case, which had already been pleaded, and invited the parties to submit their comments on the impact of the ECtHR judgment.[148] In a case relating to the constitutionality of a statute providing an automatic deprivation of the right to vote and to stand for election (for six or twelve years) when a person has been sentenced to prison for more than four months, without such deprivation resulting from any specific court decision, the Constitutional Court held that this provision was discriminatory in the way it undermined that person's right to vote and to stand for election, referring to the ECtHR's Grand Chamber judgment in *Hirst v. United Kingdom*.[149] One of the Constitutional Court's judges recently stated that the Constitutional Court had postponed the treatment of the case awaiting the Grand Chamber judgment.[150] Some commentators criticise this '*blind submissiveness*' of the Constitutional Court[151] or the straightforward application of the ECtHR's case law by the Constitutional Court without taking the specific circumstances of the case into account.[152] The Constitutional Court not only applies the ECtHR's interpretation of the rights and freedoms guaranteed in the ECHR, it also makes use of the ECtHR's interpretative methods, such as the proportionality principle.[153]

The foregoing leads to the observation that the Constitutional Court has been found in violation of the ECHR on only three occasions.[154] This is not to say that the Constitutional Court never displays reluctance. In particular in the field of immigration law and social security, the Constitutional Court sometimes expresses a reluctance to follow the case law of the ECtHR.[155] In such cases, however, the Court provides extensive reasoning as to why it does not fully follow the case law of the ECtHR.[156]

In a 1989 judgment, the Court of Cassation held that, by ratifying the ECHR, Belgium accepted the ECtHR's mission to interpret the ECHR.[157] Thus, judgments of the ECtHR are considered to have force of '*res interpretata*'[158] and Belgian courts have to comply with judgments of the ECtHR, even if

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[147] Const. Ct. 7 June 2007, no. 81/2007. See earlier judgments Const. Ct. 14 September 2006, no. 138/2006; Const. Ct. 8 November 2006, no. 165/2006; Const. Ct. 28 March, no. 60/2002.
[148] For additional examples in the field of family law, see Alen, Muylle and Verrijdt, *supra* n. 145, p. 27-29.
[149] Const. Ct. 14 December 2005, no. 187/2005.
[150] Martens 2010, *supra* n. 144, p. 352.
[151] See for a critical reflection on some recent judgments of the Constitutional Court in the field of family law, P. Senaeve, 'Kan er inzake afstamming nog zinvol wetgevend werk verricht worden?' *Tijdschrift voor Familierecht* (2011) p. 171. The comments relate to Const. Ct. 3 February 2001, no. 20/11; Const. Ct. 31 May 2011, no. 96/2011; Const. Ct. 7 July 2011, no. 122/2011.
[152] F. Swennen, 'Afstamming en Grondwettelijk Hof', *Rechtskundig Weekblad* (2011-12) p. 1102; P.F. Docquir, 'Accès à la tribune médiatique par la voie publicitaire: l'annulation de l'interdiction de la publicité politique dans les médias audiovisuels n'était pourtant pas nécessaire', *Revue de jurisprudence de Liège, Mons et Bruxelles* (2011) p. 505.
[153] See Const. Ct. 6 June 2007, no. 81/2007, referring to ECtHR 11 January 2007, *Mamidakis* v. *Greece*. See in general Martens, *supra* n. 144, p. 356.
[154] Alen, Muylle and Verrijdt, *supra* n. 145, p. 40-43, referring to *Pressos Compania Naviera SA et al.* v. *Belgium*, ECtHR 20 November 1995, appl. no. 17849/91; *Hakimi* v. *Belgium*, ECtHR 29 June 2010, appl. no. 665/08 and *Faniel* v. *Belgium*, ECtHR, 1 March 2011, appl. no. 11892/08.
[155] Alen, Muylle and Verrijdt, *supra* n. 145, p. 31-32.
[156] See e.g. Const. Ct. 13 December 2007, no. 153/2007, referring to *Koua Poirrez* v. *France*, ECtHR 30 September 2003, appl. no. 40892/98.
[157] Cass. 10 May 1989, *Pas.* (1989), I, p. 948.
[158] See F. Tulkens and S. Van Drooghenbroeck, 'La Cour de cassation et la Cour européenne des droits de l'homme. Les voies de la banalisation', in *Imperat Lex. Liber Amicorum Pierre Marchal* (Ghent, Larcier 2003) p. 121-141 and observations of Proc.-Gen. Velu preceding Cass. 14 April 1983, *Pas.* (1983), I, p. 866.

they are not handed down against Belgium.[159] In its most recent annual report, for instance, the Court of Cassation states that it must attune its case law to the case law of the ECtHR.[160] On some occasions, the Court of Cassation showed itself even more generous in the interpretation of the ECHR than the ECtHR.[161]

The Court of Cassation often refers in a general way to the position of the ECtHR with respect to the interpretation of an ECHR provision, without mentioning specific cases.[162] This is probably due to the brevity of the statements of reasoning given by the Court of Cassation in general.[163] However, in cases to which Belgium has been a party, the Court of Cassation tends to refer to the specific cases against Belgium.[164]

The same applies to the Council of State when interprets the provisions of the ECtHR: it too refers to case law of the ECtHR.[165] In a recent case, for example, in which the defending party raised some objections based on a restrictive interpretation of the procedural rules, the Council of State referred to four judgments of the ECtHR from which it concluded that such restrictive interpretations of the procedural rules would be in violation of Article 6 of the ECHR, as interpreted by the ECtHR, and rejected the objections in question.[166] The General Assembly of the Council of State, in a judgment of 21 December 2010, rejected the suspension proceedings brought against a municipal decision prohibiting the expression of religious symbols within the walls of a school and outside the walls of the school in their public function, referring to five judgments of the ECtHR, including the *Lautsi* chamber judgment.[167] In some cases, the Council of State refers to the interpretation of the ECtHR in general, without mentioning any specific cases.[168]

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[159] See C. Van de Heyning, 'Grondwettelijke conversaties: een meerwaarde voor de bescherming van fundamentele rechten? De interpretatie en toepassing van fundamentele rechten in een complexe context van gelaagde bescherming', *Tijdschrift voor bestuurswetenschappen en publiekrecht* (2012) p. 406 with reference to Cass. 28 May 2008, no. P.08.0216.F. It should, however, be added that the applicants in the case before the ECtHR cited were also the applicants before the Court of Cassation.

[160] Hof van Cassatie, *Jaarverslag 2011* [Annual report 2011], available at www.cassonline.be/uploads/397/cass2011nl.pdf, p. 14.

[161] See examples cited in J. Velu, 'A propos de l'autorité jurisprudentielle des arrêts de la Cour européenne des droits de l'homme : vues de droit comparé sur des évolutions en cours', in *Nouveaux itinéraires en droit. Mélanges en hommage à F. Rigaux* (Brussels, Bruylant 1993) p. 535-536.

[162] See e.g., Cass. 17 April 2012 no. P.11.0975.N (Art. 6 ECHR); Cass. 5 April 2011, no. P.10.1651.N (Articles 6 § 1 and 6 § 3 (c) ECHR); Cass. 20 December 2011, no. P.11.1912.N (on Arts.5.1.e and 5.4 ECHR); Cass. 24 May 2011, no. P.11.0761.N (on Arts. 6 § 1 and 6 § 3 ECHR).

[163] See Van de Heyning, *supra* n. 159, p. 406.

[164] See inter alia, Cass. 11 February 2009, no. P.08.1472.F, referring to *Taxquet* v. *Belgium* ECtHR 13 January 2009, appl. no. 926/05; Cass. 18 October 2011, no. P.11.0910.F, referring to *Taxquet* v. *Belgium*, ECtHR (GC) 16 November 2010.

[165] See, inter alia, Lemmens 1987, *supra* n. 81, p. 369, referring to Council of State, 7 August 1969, no. 13.680; Council of State 26 September 1984, no. 24.689; Council of State 20 December 1985, no. 25.995. Some recent examples include Council of State 1 December 2008, no. 188.389, referring to *Vilho Eskelinen and others* v. *Finland*, ECtHR (GC) 19 April 2007, appl. no. 63235/00, on Art. 6 ECHR; Council of State 25 March 2008, no. 181.466, referring to *L.* v. *Belgium*, ECtHR 9 March 2006, on Article 1 Protocol No. 1; Council of State 20 December 2004, no. 138.684, referring to *Entreprises Robert Delbrassine S.A. and Others* v. *Belgium*, ECtHR 1 July 2004, appl. no. 49204/99, on Art. 6 ECHR); Council of State 25 May 1999, no. 80.385, referring to ECtHR 2 September 1997, *Gallo v. Italy* on Art. 6 ECHR.

[166] Council of State, 21 November 2011, no. 216.368, referring to *Miragall Escolano and others* v. *Spain*, ECtHR 25 May 2000, appl. no. 38366/97 et al., *Běleš* v. *Czech Republic*, ECtHR 12 November 2002, appl. no. 47273/99 and *L'Erablière A.S.L.B.* v. *Belgium*, ECtHR 24 February 2009, appl. no. 49230/07.

[167] Council of State 21 December 2010, no. 210.000 referring to *Sunday Times* v. *United Kingdom*, ECtHR 26 April 1979, appl. no. 6538/74; *Kruslin* v. *France*, ECtHR 24 April 1990, appl. no. 11801/85; *Kokkinakis* v. *Greece*, ECtHR 25 May 1993, appl. no. 14307/88; *Buscarini and others* v. *San Marino*, ECtHR 18 February 1999, appl. no. 24645/94; and *Lautsi* v. *Italy*, ECtHR 3 November 2009, appl. no. 30814/06.

[168] See e.g., Council of State, 25 June 2008, no. 184.745, on Art. 7 of the ECHR.

14.a. If so, do they do this standardly / frequently / sometimes / rarely?

The Constitutional Court does this frequently. The Court of Cassation and Council of State do take the case law of the ECtHR into account, but tend to refer to the jurisprudence of the ECtHR *in abstracto* only.

14.b. Does it make a difference if your state was not a respondent party to the case at hand? I.e., do the courts generally refer to the case law of the Court as a whole (*res interpretata* effect), or is special importance given to the judgments/decisions to which the state has been a party?

The Court of Cassation and, to a lesser extent the Council of State, often refer to the case law of the ECtHR without mentioning the precise judgments or decisions they refer to. In cases to which Belgium was a party, however, the cases are often mentioned *nominatim*.

15. How do courts respond to judgments of the ECtHR in cases to which the state has been a party?
15.a. What general methods exist for the national courts to respond to such judgments (e.g. reconsidering a case after reopening; changing interpretation of national law in similar cases)?

It is common practice of the Belgian courts to change their interpretation of the ECHR or domestic law, if necessary, after a condemnation of Belgium by the ECtHR. Under certain conditions it also possible for a (criminal) case to be reopened after such a judgment by the ECtHR.

15.b. Do national courts generally comply with the ECtHR's judgments against your own state?

In general, one can say that the Belgian courts do comply with the judgments of the ECtHR. This is evident from the case law of the Constitutional Court, the Court of Cassation and the Council of State.

The Constitutional Court does not hesitate to modify its case law where this case law has been found to be in violation of the ECHR by the ECtHR. In a 1995 case relating to a Belgian statute, which retroactively excluded the liability of organisers of pilot services for damage resulting from negligence by pilots in the exercise of their functions, the Constitutional Court ruled that only acquired property enjoyed the protection of the right of property, guaranteed by Article 16 of the Constitution and Article 1 of Protocol No. 1.[169] In the subsequent proceedings before the ECtHR the applicants invoked a violation of Article 1 of Protocol No. 1, which the ECtHR held to be well-founded.[170] Since then, the Constitutional Court accepts that a financial claim may, under certain circumstances, fall within the scope of Article 1 of Protocol No. 1.[171]

The same holds true of the Court of Cassation in cases where its interpretation of a norm of domestic law has been found in violation of the ECHR. When the ECtHR held that the advocates general at the Court of Cassation could no longer participate in the deliberations of the Court's judges, the Court immediately changed its practice.[172] Recently, following the ECtHR chamber judgment in *Taxquet* v.

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[169] Const. Ct. 5 July 1990, no. 25/95; Const. Ct. 22 November 1990, no. 36/90.
[170] *Pressos Compania Naviera SA et al. v. Belgium*, ECtHR 20 November 1995, appl. no. 17849/91.
[171] Const. Ct. 21 December 2004, no. 210/2004.
[172] Practice followed since the day the ECtHR handed down its judgment of 30 October 1991, *Borgers* v. *Belgium*, appl. no. 12005/86.

Belgium, in which the ECtHR held that the absence of reasons in verdicts of Assize Courts violated Article 6 of the ECHR,[173] the Court of Cassation changed its case law[174] without awaiting the final judgment of the Grand Chamber.[175]

In addition, the newly inserted Articles 442*bis* et seq. of the Code of Criminal Procedure make it possible for the criminal courts to reconsider a case after the proceedings have been reopened by the Court of Cassation.[176] The new provisions entitle convicted persons to seek the reopening of their trial following a finding of a violation of the ECHR by the ECtHR in their case.[177] For instance, following the aforementioned judgment of the Grand Chamber in *Taxquet v. Belgium,* the Court of Cassation quashed the judgment of the Assize Court of Liège, ordered the reopening of the proceedings and sent the case for a new trial to the Assize Court of Namur.[178]

The Council of State also reconsidered its interpretation of domestic law in response to a judgment where this interpretation had been held to violate the ECHR. Following a condemnation of Belgium by the ECtHR due to the very restrictive interpretation by the Council of State of the conditions for the admissibility of pleas of nullity by non-profit organisations,[179] the Council relaxed its interpretation of the admissibility conditions in subsequent cases, explicitly referring to the case law of the ECtHR.[180]

See also Cass. 13 September 1999, *Arr. Cass.*, 1999, no. 455, where the Court of Cassation changed its restrictive position on the possibility for parties in civil proceedings to reply to an opinion of the 'ministère public' to the court, following several judgments against Belgium, including *Borgers* v. *Belgium*, ECtHR 30 October 1991, appl. no. 12005/86 and *Vermeulen* v. *Belgium*, ECtHR 20 February 1996, appl. no. 19075/91.

[173] *Taxquet* v. *Belgium*, ECtHR 13 January 2009, appl. no. 926/05.

[174] See e.g. Cass. 14 October 2009, no. P.09.1005.F; Cass. 14 October 2009, no. P.09.0903.N.

[175] *Taxquet* v. *Belgium*, ECtHR (GC) 16 November 2010, appl. no. 926/05. It is interesting to note that the Grand Chamber softened the decision of the chamber, by allowing that the reasons could also result from other elements than a formal reasoning of the verdict. Meanwhile, the Belgian Code of Criminal Procedure had also been amended, in order to meet the ECtHR's chamber judgment. See Act of 21 December 2009 reforming the Assize Court, *Official Gazette* 11 January 2010.

[176] Articles 442*bis* et seq. of the CCP were inserted by the Act of 1 April 2007 amending the Code of Criminal Procedure to allow the reopening of criminal proceedings, *Official Gazette* 9 May 2007. See in general K. Lemmens and P. Lemmens, 'De herziening of heropening van de strafprocedure: een passend middel tot herstel van een schending van fundamentele rechten?' [The revision or reopening of criminal proceedings: a suitable means to redress a violation of fundamental rights?] in *Liber Amicorum A. De Nauw* (Die Keure, Brugge 2011) p. 571-590.

[177] Article 442*bis* of the CCP reads as follows: 'If a final judgment of the European Court of Human Rights has found that there has been a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms or the Protocols thereto (hereinafter 'the European Convention'), an application may be made for the reopening – in respect of criminal matters alone – of the proceedings that resulted in the applicant's conviction in the case before the European Court of Human Rights or in the conviction of another person for the same offence on the basis of the same evidence.'
Article 442*ter* of the CCP provides:
'The following shall be entitled to apply for the reopening of the proceedings:
(1) the convicted person;
(2) if the convicted person has died, has been deprived of legal capacity or has been declared untraceable, the person's spouse, lawful cohabitee, descendants, brothers and sisters;
(3) the Procurator General at the Court of Cassation, of his own motion or at the instigation of the Minister of Justice.'
Article 442*quinquies* of the CCP provides:
'Where it appears from consideration of the application either that the impugned decision is in breach of the European Convention on the merits or that the violation found is the result of procedural errors or shortcomings of such gravity as to cast serious doubt on the outcome of the proceedings in issue, the Court of Cassation shall order the reopening of the proceedings, provided that the convicted person or the entitled persons under Article 442*ter*, point (2), continue to suffer very serious adverse consequences which cannot be redressed other than by reopening the trial.'

[178] Cass. 18 October 2011, no P.11.0910.F. The Court of Cassation motivated its decision in the following terms: 'Si l'article 6.1 de la Convention ne requiert pas en soi que les jurés donnent les raisons de leur décision, il impose toutefois que l'accusé bénéficie de garanties procédurales suffisantes contre l'arbitraire lui permettant de comprendre le verdict de culpabilité rendu à son égard. Tel n'est pas le cas lorsque l'absence de motivation du verdict ne permet pas à la Cour de vérifier si la condamnation est fondée dans une mesure déterminante sur le témoignage anonyme recueilli à charge de l'accusé ou si elle prend appui sur d'autres modes de preuve qui le corroborent conformément à l'article 341, alinéa 3, ancien du Code d'instruction criminelle.' See in addition, Cass. 17 June 2008, no P.08.0070, following *Göktepe* v. *Belgium*, ECtHR 2 June 2005, appl. no. 50372/99; Cass. 11 February 2009, no. P.08.1472, following *Delespesse* v. *Belgium*, ECtHR 27 March 2008, appl. no. 12949/05.

[179] *L'Erablière A.S.B.L. v. Belgium*, ECtHR 24 May 2009, appl. no. 49230/07.

[180] Council of State 21 November 2011, no. 216.368.

15.c. Do national courts try to adapt or limit the effect of the Court's judgments against your own state, e.g. by adapting the Court's interpretation to fit in as far as possible with the national legal system and the national legal traditions?

The current practice of the Belgian courts seems to be that they generally comply with the judgments of the ECtHR in cases to which Belgium has been a party. They do not seem to limit the effect of these judgments.

This has not always been the case. After the *Le Compte I* judgment of the ECtHR,[181] holding that disciplinary proceedings before the disciplinary courts of the *Ordre des médecins* had to be held in public if the doctor in question requested publicity, the Court of Cassation flatly refused to follow the ECtHR's judgment and maintained its position in the other sense.[182] A year later, in *Le Compte II*, the ECtHR reaffirmed its position.[183] From then on, the Court of Cassation followed the case law of the ECtHR.[184]

16. How do courts respond to judgments/decisions of the ECtHR in cases to which the state has <u>not</u> been a party?
16.a. Do the national courts apply a strict 'mirror principle' approach, i.e. do they apply the Court's interpretations as carefully and strictly as possible without offering more or less protection to fundamental rights?

It is difficult to give a comprehensive answer to this question, since the ECtHR's interpretation of a right results from an *in concreto* review of the case, taking into account all the circumstances of that case. The extent to which an interpretation of the ECtHR can be transposed to the Belgian legal order does therefore depend on a number of factual and legal circumstances, the exact formulation of the relevant principles of domestic law, the scope of application *ratione materiae* of the constitutionally protected rights and freedoms, etc. In general, however, we have the feeling that the courts, and especially the higher courts, try to adopt a strict '*mirror principle'* approach: they follow the interpretations of the ECHR by the ECtHR,[185] but do not feel the need to go further.

This may occasionally be different for the Constitutional Court. The generosity with which it embraces the case law of the ECtHR may have led it to apply the ECtHR's case law to cases with different factual and legal circumstances, thus offering more protection than that strictly required by the ECtHR.[186] It also happens that lower courts sometimes interpret the ECHR in a broader way than the ECtHR. This may be due to a lack of satisfactory understanding of the case law of the ECtHR.

16.b. Do the national courts (sometimes) provide more protection to fundamental rights, e.g. by consciously applying national constitutional provisions or interpreting the ECHR provisions in a more protective manner?

We refer in general to our previous answer.

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181 *Le Compte, Van Leuven and De Meyere* v. *Belgium*, ECtHR 23 June 1981, appl. nos. 6878/75 and 7238/75.
182 Cass. 21 January 1982, *Arr. Cass.*, 1981-82, 647, with opinion proc.-gen. F. Dumon.
183 *Albert and Le Compte* v. *Belgium*, ECtHR 10 February 1983, appl. nos. 7299/75 and 7496/76.
184 Cass. 14 April 1983, *Arr. Cass.*, 1982-83, 968, with opinion advoc.-gen. J. Velu.
185 To give an example, we can refer to the case law of the Court of Cassation on freedom of the press. The Court of Cassation does not refrain from quashing judgments that do not sufficiently demonstrate the need to restrict freedom of the press. As such, according to commentators, the Court of Cassation has completely incorporated the Strasbourg Court's case law (D. Voorhoof and P. Valcke, *Handboek Mediarecht* (Brussels, De Boeck 2011) pp. 36-67).
186 See e.g. the criticism by Swennen, *supra* n. 152, p. 1102, referring to Const. Ct. 3 March 2011, no. 20/2011 and Const. Ct. 7 July 2011, no. 122/2011, in which the Constitutional Court held some provisions of the Civil Code to be in violation of Art. 22 of the Constitution read in conformity with Art. 8 of the ECHR and the judgment of the ECtHR of 12 January 2006, *Mizzi* v. *Italy*, appl. no. 26111/02. See in addition Alen, Muylle and Verrijdt, *supra* n. 145, p. 29-31.

In cases where the Constitution ensures broader protection, the Constitutional Court will follow the constitutional provision.[187] This is for instance the case with respect to those rights for which the Constitution provides that limitations must be based on a formal 'law', i.e. an act of Parliament, while the ECHR merely requires that limitations should be provided by 'law', in the sense of a general norm, but not necessarily a statutory one. Another interesting example of a constitutional provision that offers broader protection than the ECHR is Article 25, which explicitly prohibits prior censorship of printed materials, while Article 10 of the ECHR (freedom of expression) does not formally prohibit preventive measures.

16.c. Do national courts try to adapt or limit the effect of the Court's judgments/decisions, e.g. by adapting the Court's interpretation to fit as far as possible with the national legal system and the national legal traditions?

The Constitutional Court generally takes account of the case law of the ECtHR, including cases to which Belgium has not been a party, as if it were binding.

As far as the Court of Cassation is concerned, there are indications that it may interpret the ECHR provisions in a more limited manner than the ECtHR has done in cases involving other states than Belgium. This is particularly evident from the recent case law of the Court of Cassation relating to the effects of the *Salduz* v. *Turkey* judgment of the ECtHR. Until the legislature adapted Belgian law to the requirements following from that judgment (with respect to assistance by a lawyer in the initial stages of criminal proceedings), the Court of Cassation adopted a restrictive interpretation of the ECtHR's judgment, for instance with respect to the role of the lawyer during interrogations by the police.[188] The Court of Cassation thereby explicitly referred to the existence of certain guarantees offered by Belgian law to suspects, which in the Court's view would be at risk if one were to follow the ECtHR's case law without reservation,[189] or which at least compensated for the absence of a lawyer during the suspect'sinitial interrogation.[190] This is not to say that the Court of Cassation's intention was to show hostility to the ECtHR's case law. We would rather argue that in restricting the effects of the *Salduz* judgment, the Court of Cassation wanted to comply, in good faith, with the Strasbourg case law, while at the same time, for pragmatic reasons, it did not want to complicate criminal proceedings to such an extent that, until further action by the legislature, investigators would be faced with practical difficulties of considerable importance.

In some other cases, the restrictive approach of the Court of Cassation has led to a divergence in case law between the Court of Cassation and the Constitutional Court and a condemnation of Belgium precisely because of the restrictive interpretation of the Court of Cassation.[191]

In general, the Council of State seems to follow the judgments of the ECtHR in cases to which Belgium has not been a party, without trying to limit their effects in the Belgian legal order.

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[187] See, e.g. Const. Ct. 26 April 1994, no. 33/94, on the non-applicability of Art. 6.1 ECHR to a dispute involving a court registrar.

[188] See e.g. Cass. 24 January 2012, no. P.12.0106.N, *Tijdschrift voor strafrecht,* 2012, 170-172, in which the Court held that the merely passive role attributed to the lawyer did not violate Art. 6 ECHR. See in general F. Schuermans, 'Cassatie tempert Salduz-commotie', in J*uristenkrant* 2010, no. 207, p. 3, referring to Cass. 23 March 2010, no. P.10.0474.N, and Cass. 31 March 2010, no. P.10.0504.F; S. De Decker, *Salduz: een regen van arresten in Straatsburg, slechts druppels in Brussel?*, in F. Goossens, H. Berkmoes, A. Duchatelet and F. Hutsebaut, *De Salduzregeling: theorie en praktijk, vandaag en morgen* (Brussels, Politeia 2012) p. 83-94.

[189] Cass. 26 May 2010, no. P.10.0503.F.

[190] Cass. 23 November 2010, no. P.10.1428.N.

[191] See the case law cited by Alen, Muylle and Verrijdt, *supra* n. 145, p. 35-40.

17. How do courts deal with the ECtHR's margin of appreciation doctrine?
17.a. Do they apply the margin of appreciation doctrine in the same way as is done by the ECtHR?

While the margin of appreciation doctrine is used by the ECtHR in the context of its relationship with all national authorities, including domestic courts, that notion is sometimes also relied on by the Belgian courts in the context of their relationship with non-judicial public authorities. The margin of appreciation is then used as an aspect of the principle of separation of powers, comparable to the notion of 'discretionary power' in administrative law.

Where the margin of appreciation is referred to, it is usually part of the 'necessity' or proportionality test. The Constitutional Court, for instance, accepts that the legislature enjoys a margin of appreciation, even a wide one, in certain areas. This does not, however, rule out that a legislative act may be disproportional and amount to an unjustified interference with a right or freedom if the measure imposed by that act does not strike a fair balance between the demands of the general interest and the requirements to protect that right.[192] On some occasions, the Court links the existence of a wide margin of appreciation for the legislature to a corresponding limitation of the scope of its own review. In particular, since the 'general interest' is a broad and vague notion, the legislature enjoys a wide margin of appreciation to carry out an economic and social policy. The Court accordingly considers that it has to respect the way the legislature implements the requirements of the public interest or the general interest, unless the legislature's judgment is manifestly without reasonable ground.[193]

We are not aware of any (recent) case law of the Court of Cassation that explicitly refers to the margin of appreciation doctrine of the ECtHR.

Not many cases have come before the Administrative Litigation Section of the Council of State that refer to any margin of appreciation for the authorities. This can perhaps be explained by the fact that the Council of State is very much used to the term 'discretionary power' and similar expressions, which have sometimes been interpreted by the Council in the same manner as the margin of appreciation as explained by the ECtHR.[194]

An interesting example of the use of the term 'margin of appreciation' in the sense of the ECtHR's case law, *i.e.* relating to the subsidiary role of the ECHR control system, can be found in a number of opinions of the Legislation Section of the Council of State. These opinions concerned draft legislation or regulation aimed at restricting the wearing of religious symbols in the public sphere. In these opinions the Council of State noted that according to the case law of the ECtHR the States enjoyed a

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[192] See e.g. Const. Ct. 22 June 2005, no. 107/2005 and Const. Ct., 24 April 2008, no. 72/2008 (tax related matters, referring inter alia to *Gasus Dosier- und Fördertechnik GmbH* v. *Netherlands*, ECtHR 23 February 1995, appl. no. 15375/89; *S.A. Dangeville* v. *France*, ECtHR 16 April 2002, appl. no. 36677/97; *Buffalo srl* v. *Italy*, ECtHR 3 July 2003, appl. no. 38746/97; *M.A. and E. Imbert de Tremiolles* v. *France*, ECtHR 4 January 2008 (dec.), appl. nos. 25834/05 and 27815/05); Const. Ct. 30 March 2010, no. 32/2010 (tax related matters, referring to *Dukmedjian* v. *France*, ECtHR 31 January 2006, appl. no. 60495/00 and *Tardieu de Maleissye and others* v. *France*, ECtHR 15 December 2009 (dec.), appl. no. 51854/07); Const. Ct. 22 October 2008, no. 139/2008 (social, economic and tax measures, referring to *The Former King of Greece and others* v. *Greece*, ECtHR 23 November 2000, appl. no. 25701/94).

[193] See Const. Ct. 3 December 2008, no. 173/2008, and Const. Ct., 31 May 2012, no. 71/2012 (referring to *James* v. *United Kingdom*, ECtHR 21 February 1986, appl. no. 8793/79; *Mellacher* v. *Austria*, ECtHR, 19 December 1989, appl. nos. 10522/83, 11011/84 and 11070/84; *Former King of Greece* v. *Greece*, ECtHR 23 November 2000, appl. no. 25701/94; *Bäck* v. *Finland*, ECtHR 20 July 2004, appl. no. 37598/97; *Hutten-Czapska v. Poland*, ECtHR (GC) 22 February 2005, 35014/97; *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd* v. *United Kingdom*, ECtHR (GC) 30 August 2007, appl. no. 44302/02; *Gauchin* v. *France*, ECtHR 19 June 2008, appl. no. 7801/03).

[194] Council of State, 17 November 2008, no. 187.998.

wide margin of appreciation in this area. As a result, the Council focused on the constitutional provisions rather than on the ECHR.[195]

17.b. If so, do the courts make careful use of the doctrine, or do they sometimes opt for an overly narrow or overly wide margin of appreciation?

Having regard to the answer to the previous question, the present question does not seem to be very relevant. It is in any event difficult to express an opinion on how the margin of appreciation doctrine is generally used by the Belgian courts.

18.a. How intensely do courts review legislation and/or administrative decisions for their conformity with the ECHR? Do they always opt for marginal / deferential review (test for manifest violation) or can the scrutiny be more strict?
18.b. If strict scrutiny is possible, which standards or factors determine the intensity of the courts' review?

The way the courts review legislative as well as administrative acts for conformity with the ECHR does not seem to differ from the way they review these acts in the light of provisions of domestic law.

Where the applicable norms leave no space for policy choices to be made by the competent public authorities, judicial review will obviously be strict. This, however, is not the situation to be expected in cases concerning alleged interferences with fundamental rights.

Where the applicable norms do leave space for policy choices to be made by the competent public authorities, it is not for the courts to substitute their views for those of the authorities. This is the situation where the public authorities have a so-called 'discretionary power'. The role of the courts is in such cases limited to reviewing whether the legislative or administrative act complained of remains within the limits set by the applicable higher norms on the power of the competent authority. Since, according to general principles of law, measures adopted by a legislative or administrative authority may not be unreasonable or disproportionate, the review by a court can thus include a review of whether the measure complained of is not (manifestly) unreasonable or disproportionate.
These principles of judicial review seem to apply when a court is asked to review an act in light of fundamental rights guaranteed by the Constitution or the ECHR. There does not seem to be an *a priori* reason why the courts would apply a more strict scrutiny when fundamental rights are involved. Of course, when it comes to reviewing the proportionality of interference, *i.e.* to reviewing whether a fair balance has been struck between the competing interests involved, special weight could be given to the fact that there is an interference with individual rights that are considered to be fundamental rights. This may then result in a stricter review than when an interference with other rights or interests is the subject of review.

[195] See e.g. Council of State, Legislation Section, opinion of 20 April 2010, no. 48.022/AG, *Parl. Doc*. Wall. Parl. 2009-10, no. 99/2, discussed in Council of State, *Jaarverslag 2009-2010*, available at www.raadvst-consetat.be/?lang=nl&page=about_annualreports. See in addition, Council of State, Administrative Litigation Section, 21 December 2010, no. 210.000, referring to this opinion.

19. Do the courts make use of special interpretative techniques used by the ECtHR, such as evolutive interpretation (interpretation 'in the light of present day conditions') or consensus interpretation? If so, can you estimate if they do so standardly / frequently / sometimes / rarely?

As has already been explained above, Belgian courts try to interpret the ECHR in such a way that their interpretation is in line with the interpretation by the ECtHR.[196] They do not seem to venture in the direction of an evolutive interpretation, and do not seem to search for any consensus among the Member States of the Council of Europe. The advantage of this judicial strategy is obvious – at least from the domestic courts' perspective. Indeed, instead of taking the risk of giving, themselves, a new interpretation to legal provisions, they can await new developments at the European level, and then introduce them domestically.

Even where a Belgian court would adopt an evolutive interpretation of the ECHR, it is not certain that this would emerge from the reasoning of its decision. The style of judgments is such that the hesitations of the judges, or the techniques used to come to a given interpretation, are generally not disclosed. Although this arguably could be different with respect to the ECHR, the authors were not able to find relevant examples.

20. Is the role and position of the ECtHR debated in your country? If so:
20.a. Where is the criticism mainly visible (media, politics, scholarship, court room)?

There is indeed a discussion of the role of the ECtHR in Belgium (mainly in Flanders). This critique is voiced by some scholars, such as Marc Bossuyt, the President of the Constitutional Court,[197] and Matthias Storme, a scholar who declares himself a 'conservative'.[198]

As yet, however, this discourse does not seem to have infiltrated the general media. The media pay relatively little attention to the functioning of the ECtHR. What we can ascertain is that they will report particular judgments – mostly concerning Belgium – on controversial issues.[199] It does not seem that the media systematically criticise the ECtHR. It may even be rather the opposite.

The ECtHR is not the object of a political debate, although politicians who do not agree with the Court's rulings may of course occasionally express their dissatisfaction. A more general reaction came from the extreme-right party *Vlaams Belang*, which tabled draft resolutions in the federal

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[196] See above, answer to question 13.

[197] See, inter alia, M. Bossuyt, *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant (Brussels, Bruylant 2010);* M. Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers', Inter-American and European Human Rights Journal (2010) p. 3-48; M. Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court', Eur. Const. L. Rev. (2012) p. 203-245. The author criticises in particular *the case law of the ECtHR with respect to rejected asylum seekers, which he describes as a slippery slope. The opinion of Bossuyt received some media attention. See J. De Wit, 'Bossuyt: 'Mensenrechtenhof gaat boekje te buiten in asielzaken'', in Gazet van Antwerpen 11 May 2010, available at* www.gva.be/nieuws/experts/johndewit/bossuyt-mensenrechtenhof-gaat-boekje-te-buiten.aspx*. Bossuyt also criticised the way the ECtHR expanded the scope of the ECHR to include social rights:* M. Bossuyut, 'Should the Strasbourg Court Exercise More Self-restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations', Human Rights Law Journal(2007) p. 321-332.

[198] See, e.g., H. Rijkers, *Discrimineren is een Mensenrecht. Interview met Matthias Storme*, available at www.storme.be/IntStormeKN21012005uitgebreid.pdf.

[199] For example, a recent case in which Belgium was convicted for the degrading treatment of internees (ECtHR 2 October 2012, *L.B. v. Belgium*) received a lot of attention in major Belgian newspapers. See for instance for Flanders M. Eeckhaut, 'België veroordeeld voor behandeling geïnterneerden', in *De Standaard* 4 October 2012, available at www.standaard.be/artikel/detail.aspx?artikelid=DMF20121003_00321546&word=Hof+Rechten+Mens. Less attention was given to this case in the French-speaking part of Belgium. See for instance X., 'Des détenus réclament 1,5 million d'euros à la Justice', *Le Vif Express* 8 October 2012, available at www.levif.be/info/actualite/belgique/des-detenus-reclament-1-5-million-d-euros-a-la-justice/article-4000189650663.htm#.

House of Representatives and the Senate aimed at preventing the ECtHR from turning itself into a *gouvernement des juges*. The party also would like to see the ECtHR stop 'broadening' the scope of the ECHR. [200] These resolutions have not been debated, however.

20.b. What kind of criticism is usually voiced (complaints about expansion of scope; quality of judgments; independence and impartiality of judges; disrespect for national sovereignty; insufficient knowledge of national law; etc.)?

Such criticism as is raised mainly concerns two issues. In the first place, and this is essentially Bossuyt's critique, it is stressed that the ECtHR has a tendency to enlarge the scope of the ECHR. Bossuyt's criticism of the case law on social rights and asylum seekers has clearly served as inspiration.[201] Secondly, there is an argument based on a lack of respect for the subsidiarity principle. It is said that the ECtHR goes too far into mere 'national' matters, in violation of both its mission (which is essentially subsidiary) and national sovereignty. The argument here is that the judges in Strasbourg tend to behave as legislators, without enjoying their legitimacy.[202]

20.c. If there is any criticism, is this a new development? When did the criticism first become apparent? Can you explain what gave rise to the criticism?

The criticism is indeed a fairly new development. Traditionally, the ECtHR was generally considered in a positive way in Belgium. Nevertheless, we feel that this positive attitude has somewhat changed. Two elements seem to coincide.

In the first place, there is the criticism already referred to, by scholars like Bossuyt and Storme. Most probably, that criticism gained visibility after the debate initiated by Baudet in the Dutch general media.

Secondly, at the same time, the ECtHR also delivered some judgments with far- reaching consequences or which at least had a serious impact on the Belgian legal order. Relevant examples here are the judgments in the *Salduz v. Turkey* case[203] and the *Taxquet v. Belgium* case[204] (even if the Grand Chamber judgment softened the impact of the chamber's decision). These judgments reminded the public at large of the potentially enormous impact of the Strasbourg Court's decisions.[205]

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[200] Draft resolution concerning the transgression of jurisdiction by the European Court of Human Rights, *Parl. Doc.* House of Repres. 2011-12, no. 53-1949/1; draft resolution concerning the transgression of jurisdiction by the European Court of Human Rights, *Parl. Doc.* Senate 2011-12, no. 5-1448/1.

[201] M. Bossuyt, *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant, (Brussels, Bruylant 2010) p. 189.*

[202] See, apart from the draft resolutions of the 'Vlaams Belang' mentioned in note 199, J. De Wit, 'Steeds meer kritiek op het Mensenrechtenhof in Straatsburg' in *Gazet van Antwerpen*, 1 August 2012, available at www.gva.be/nieuws/experts/johndewit/aid1216391/steeds-meer-kritiek-op-mensenrechtenhof-in-straatsburg.aspx.

[203] *Salduz* v. *Turkey*, ECtHR (GC) 27 November 2008, appl. no. 36391/02. The *Salduz* judgment had a vast influence on Belgian criminal procedure. The case led to a number of judgments of the Court of Cassation and later to an amendment of the Code of Criminal Procedure. The effects of the *Salduz* judgment received a lot of media attention.

[204] *Taxquet* v. *Belgium*, ECtHR (GC) 16 October 2010, appl. no. 926/05. Again, this judgment led to a number of judgments of the Court of Cassation (see e.g. Cass. 3 May 2011, *Arr. Cass.* 2011, 1124-1135) and to an amendment of the Code of Criminal Procedure.

[205] These developments are in reality not very new. In the past the ECtHR also received a lot of attention for some of its judgments, as in the cases of *Marckx* v. *Belgium*, ECtHR 13 June 1979, appl. no. 6833/74 (and its impact on family law) and *Le Compte, Van Leuven and De Meyere* v. *Belgium*, ECtHR 23 June 1981, appl. nos. 6878/75 and 7238/75 (and its impact on disciplinary law).

20.d. Does the criticism affect the status of the ECHR and the ECtHR's judgments/decisions in judicial decision making? If so, what concrete effects does this have (e.g. more frequent references to the margin of appreciation doctrine, more references to national constitutional law, restrictive interpretation of ECtHR judgments/decisions, disapplying the ECHR in favour of national (constitutional) law)?

It is hard to give a general answer to this question. As indicated above, traditionally there is close compliance with the case law of the ECtHR.[206] We have no evidence that Belgian courts comply less with the ECHR than before the criticism of the ECtHR started.

21. Are there any intentions at the political level to amend the constitution or legislation in order to change the courts' competences in relation to the interpretation and application of the ECHR?

The official policy of Belgium, as expressed by the Ministers of Foreign Affairs and Justice, is to comply with its obligations under the ECHR, and to support the ECtHR.

This was confirmed, for instance, when the adaptation of Belgian law to the ECtHR's *Salduz* judgment was discussed in parliament. While some members of parliament voiced critical comments about the ECtHR, the minister of Justice stated unambiguously that the ECtHR should be able to decide cases in all independence, and that its judgments had to be given full effect, even if there could be a discussion on what this meant in practice. Notwithstanding the far-reaching consequences of the *Salduz* judgment, it was not a reason to question the ECtHR's authority.[207]

It should also be noted that after the Brighton Conference on the future of the ECtHR (April 2012), the Minister of Justice declared in parliament that she was satisfied with the outcome of the Conference, and mentioned some points of the Brighton Declaration on which the Belgian government had made efforts to soften the text as it had been submitted by the host government.[208]

PART 4 – Access to information and judgments

22. To what extent do national judges have access to and knowledge of the ECHR and the case law of the ECtHR?
22.a. Are judges trained to apply the ECHR, either in law schools or in professional training?

International human rights law, including the law of the ECHR, has for many years been a regular part of the curriculum in all law schools.

The training programmes for judges regularly contain modules on the ECHR, or on certain aspects of it.[209]

22.b. How is information about the judgments/decisions of the ECtHR made available to the courts?

No systematic information is available to the courts on developments in the case law of the ECtHR. This does not seem to have a negative impact on the knowledge of such case law by the courts, as

[206] See above, answer to question 13. This is evident as far as the Constitutional Court is concerned. See Alen, Muylle and Verrijdt, *supra* n. 145, p. 19-33 and p. 44.
[207] Declaration by the Minister of Justice, report of the Commission of Justice, *Parl. Doc.*, Senate, 2010-11, no. 5-663/4, p. 17.
[208] Declaration by Ms Turtelboom, Minister of Justice, *Annales*, Senate, 2011-12, 26 April 2012, no. 5-57, pp. 31-32.
[209] The formation of judges is currently entrusted to the Institute for Judicial Formation. See http://www.igo-ifj.be.

judges have access to the ECtHR's website and other relevant websites. Moreover, there is a fair amount of legal doctrine on the ECtHR's case law.
Occasionally, a judgment of the ECtHR handed down against Belgium is published on the 'Juridat' website, operated by the Ministry of Justice, which primarily contains judgments of Belgian courts.[210]

22.c. Are important judgments/decisions of the ECtHR available in the national language, e.g. because the government provides translations?

Insofar as judgments and decisions of the ECtHR are pronounced in French, or later translated by the ECtHR into that language, there is of course no problem for French speaking persons in reading these judgments and decisions. It can be assumed that there will equally not be a problem for Dutch speaking persons.

It is not clear to what extent judgments and decisions pronounced in English can be understood by Dutch speaking and French speaking persons. We assume, however, that there will not be a problem for most professionals in the legal field.

In the past, the Ministry of Justice provided translations in Dutch of the judgments handed down against in Belgium. This practice was stopped a number of years ago, perhaps because there was little interest in such translations.

22.d. Do you think there is an impact on the use of ECtHR judgments/decisions by national courts of the fact that they are usually only available in English and French?

We assume that in the French speaking part of Belgium attention will go almost exclusively to case law that is available in French. In the Dutch speaking part of Belgium attention will probably go to case law that is available in English or in French, depending on the preference of the user. This means that a significant part of the ECtHR's case law may be ignored in each case. Fortunately, however, the most important judgments and decisions of the ECtHR are handed down or later translated in both languages.

23. Are national judgments/decisions in which the ECHR plays a role available electronically? Are they translated into English?

Important judgments of the Belgian courts, in particular those of the three supreme courts (Constitutional Court, Court of Cassation and Council of State) are available on the websites of these courts and on the 'Juridat' website.

Judgments are not translated into English.

PART 5 – Concluding questions

24. To what extent do you think that there is a connection between, on the one hand, the main features and characteristics of your constitutional system and the status of international law in the national legal system and, on the other hand, the impact of the ECHR and the judgments of the ECtHR on national case law?

It seems to us that Belgian courts, all in all, seem to comply with the ECtHR's case law without too many conflicts. The status of the ECHR is not seriously challenged. We think this is to some extent due to some specific features of the Belgian constitutional system.

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[210] The website can be found at www.cass.be/pyramide_fr2.php.

In the first place, it should be recalled that the Court of Cassation decided in 1971 - albeit within the field of EU law - that self-executing provisions of international law had priority over national legislation.[211] Since then, the priority of international law is considered to be a general principle of Belgian law. Pursuant to that principle, ECHR provisions have on many occasions received priority over domestic legislation. Although rather controversial at that time, the principle is one of the key elements of the Belgian legal order.[212]

For many years, roughly for 20 years since 1971, the ECHR was the main source of fundamental rights law, as constitutional review of legislative acts was excluded and there was no Constitutional Court.

The constitutional basis for a Constitutional Court was created in 1980; the Court became operational in 1984; and in 1989 it became competent to review legislative acts in the light of certain constitutional provisions guaranteeing fundamental rights. It goes without saying that the introduction of such a court was a paradigm shift in the Belgian legal system, as the idea of the 'sovereignty of the law' was totally abandoned. The creation of the Constitutional Court drew attention (back) to the Constitution. However, since the Constitutional Court considers that the constitutional provisions on fundamental freedoms have to be read in the light of the ECHR, the ECHR did not lose any of its relevance. On the contrary, the ECHR became 'constitutionalized', in the sense of its becoming incorporated in the Belgian constitutional design.

In sum, one could argue that the 'new' Belgian constitutional model is based on the idea that international law should prevail over national legislation as well as on the concept of constitutional review. In such circumstances, it may not come as a great surprise that the case law of the ECtHR has been rather acclaimed than criticized and that the ECHR and the case law of the ECtHR have been integrated in national legal practices without any serious objection.

25. How does the application of the ECHR in the case law of the states relate to the role of national fundamental rights (e.g. constitutional rights)?

It is clear that national courts do refer very frequently to the ECHR. At this point, we do not have to repeat how the Constitutional Court considers the constitutional rights and the analogous rights of the ECHR as a whole. Therefore, the ECHR plays a key role in the interpretation of fundamental rights by the Constitutional Court.

The situation may be slightly different before the ordinary courts and the administrative courts (mainly the Council of State). It is important, though, to understand that attorneys, when developing a legal argument, tend to ground it on as many provisions as possible. Here again, constitutional provisions and provisions of the ECHR are often jointly invoked. Needless to say, there is an influence of the ECHR and the ECtHR's case law on the interpretation of fundamental rights.

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[211] See above, answer to question 3.b.

[212] It remains unclear, however, to what extent the principle can or should be applied to the relation between international law and the Constitution. See Alen and Clement, *supra* n. 67, p. 5-26. The Constitutional Court, the Court of Cassation and the Council of State differ among themselves on the question of the priority of international law over the Constitution.

Before the creation of the Constitutional Court, constitutional rights had a sort of 'dormant existence'. Fundamental rights issues were dealt with almost solely in an ECHR perspective. The ECHR being an international treaty, judges could directly review legislative and administrative acts and judgments of lower courts for their compatibility with the ECHR. As far as constitutional review was concerned, only administrative acts and judgments could be the object, and even then there was the risk that such a review would be considered a disguised form of constitutional review of the underlying legislation.

The emergence of the Constitutional Court and the preliminary ruling system made it possible to review the constitutionality of legislation. Only from that moment on did national constitutional rights play an important role in the Belgian legal system. Concepts such as the 'constitutionalization of private law' illustrate this relatively new phenomenon. In theory, there could have been notable differences between the interpretation of the national constitutional rights and the rights of the ECHR. In practice, there are no serious conflicts. This is due mainly to a dual mechanism: on the one hand, the Constitutional Court, which reads the Constitution and the ECHR as a whole and, on the other hand, the dialogue between the Constitutional Court and the other courts through the preliminary ruling system.

26. To what extent do you think that debates on the role of the ECtHR and its judgments have an impact on national case law?

As stated previously, we feel that criticism in Belgium is rather limited and certainly not sufficiently strong and widespread to have any visible impact on national case law. Furthermore, one can observe a tendency in Strasbourg towards more judicial self-restraint – cf. the renewed interest in the margin of appreciation. In the near future, one might therefore expect less criticism of the ECtHR. So even if, in the years to come, national judges were to become more open to challenging the ECtHR's role, they might have fewer reasons to do so.

27. Do you think there is any relation between the debate on the ECHR and the national constitutional system for implementing international law and if so, to what extent?

The debate on the ECHR, already limited in Belgium, does not seem to have an impact on the constitutional system for the implementation of international law.

We would like to point out, however, that there is sometimes criticism of the lack of 'democratic' underpinnings of supranational law, i.e. mostly EU law. Yet, given the impact of EU law and the fact that the Belgian population is more familiar with the existence of the EU than the Council of Europe and the ECHR, it would be wrong to claim that the criticism of the ECHR opened the door to further criticism of other international legal systems. Rather, it would seem that the reverse is true: the criticism of the ECHR could be accessory to the criticism of the impact of EU law on the Belgian legal order.

FRANCE

Céline Lageot

PART 1 – The status of international law in the national Constitutional system

1. Can you briefly characterise your national Constitutional system? Please pay attention to matters such as:

- **Character of the state (monarchy, republic…)**
- **System of government (parliamentary, presidential…)**
- **Character of the Constitution (written, unwritten)**
- **System for and extent of separation of powers (both horizontal (*trias politica*), and vertical (federation vs. unitary state, decentralisation or devolution))**
- **Main sources of fundamental rights**

After the events in Algeria and the subsequent collapse of the Fourth Republic, France adopted a new Constitution in 1958 and asked General de Gaulle to become the Head of State. The Fifth Republic explicitly promoted the principle of separation of powers between the three branches of the state, namely: Title II (the head of state) and III (the government) – the executive power; Title IV (Parliament) – the legislative power; and Title VIII – the judicial authority.

The system of separation of powers (*trias politica*) has prevailed in France since the adoption of the Revolutionary Act of 16 and 24 August 1790 on the Separation of Administrative and Judiciary Bodies. The French Constitution, which is a written constitution, has recently been amended (Constitutional Revision of 23 July 2008) to reduce some of the very important powers allowed by the architects of the Constitution to the executive power. The balance of power has always been strongly in favour of the executive, although the principles of a parliamentary regime remain, and this was not reversed by the changes of July 2008.

The executive power is exercised by both the Head of State (the President of the Republic) and the Prime Minister, who each exercise specifically allocated powers. Until 1962, the President was elected by an assembly of greater electors, but Charles de Gaulle changed the type of election in order to reinforce the power of the Head of State as a prominent figure of the regime. Since this major constitutional reform, the Constitutional Act of 6 November 1962, which led to the 'majority fact' (or coincidence of the majorities for the executive and the legislature), the President has been directly elected by the people. Until 2000, the mandate was for seven years. Since the Constitutional Revision of 24 September 2000, the term has been reduced to five years, in order to avoid the risks of a new "cohabitation" or non-coincidence of the majorities in the executive and the legislature. The direct consequence is the intensification of presidential primacy.

When the President of the Republic enters office, the first thing he or she has to do is appoint the Prime Minister. The Head of State is not bound by anyone for this appointment (the Constitution refers to "proper power" or *pouvoir propre*). The President has the discretion to appoint whomever she or he wants (Article 8 al. 1). Beyond the power to choose the Prime Minister, the President has also, as proper powers, the capacity to dissolve the National Assembly (Article 12), to exercise full powers in emergency situations (Article 16), to send messages to Parliament (Article 18), to organise legislative referenda (Articles 11 and 88-5), to nominate three members of the Constitutional Council (one of whom is its President) (Article 56) and to refer ordinary acts and international treaties to this Council for judicial review of their constitutionality (Articles 61 and 54).

Despite these strong presidential powers, the main criterion of the parliamentary regime is met: the Prime Minister is the Head of Government and is politically accountable to the National Assem-

bly, which can theoretically dismiss the Prime Minister and the entire Government. However, the conditions of the motion of censure are so strict in the French Constitution that only one Government has been dismissed by the National Assembly, on 5 October 1962.

The legislative power is exercised by a Parliament composed of two houses, the National Assembly and the Senate. Members of the National Assembly (*députés*) are directly elected by the citizens for five years whereas members of the Senate (*sénateurs*) are elected for six years by a board of local representatives. (A constitutional reform in 2000 reduced the mandate of the Senators to three years.) The two houses are not equal in terms of representation or powers: the National Assembly represents the people, while the Senate represents the local communities. The National Assembly has more power than the Senate to expand and improve parliamentary acts, because the Government can give the last word to the Assembly in case of disagreement. Moreover, as stated previously, theoretically the Assembly can dismiss the Government. The only real power which remains in the Senate's hands is the power of veto, which it can use during the Constitutional Revision procedure.

All this makes the French regime quite singular, a very odd mixture of parliamentarian and presidential systems.

Thanks to Napoleon I, France has long been a unitary state and a highly centralised country with elements of de-concentration. From 1980 however, the country started to change this tradition to become decentralised. It was under the presidency of François Mitterrand that local democracy, in terms of autonomy of competencies and finances, became real. The 2nd March 1982 Act remains one of the most important legislative measures of the first mandate of President Mitterrand. From then on, the communes, *départements* and regions, together commonly called local bodies (*collectivités locales*) or territorial communities (*collectivités territoriales*), have received proper competencies and greater autonomy in areas such as local finance. The communes are given charge of proximity actions (*actions de proximité*), the *départements* take on the social actions, and the regions are responsible for the economic ones.

In 2003, a Constitutional Revision largely supported by former Prime Minister, Jean-Pierre Raffarin, consolidated the 1982 Act on decentralisation. At the local level and under certain conditions, the Act introduced the referendum, the right to petition and greater autonomy for public bodies, without, however, providing any supplementary financial means. Local finances were finally dealt with in a specific statute in the Constitutional Revision of 29 March 2003. The principle of autonomy of local bodies is now stated in the Constitution at every local level: this had always been the case for communes and *départements* since the adoption of the Constitution of 1958, but it was only in 2003 that the regions received constitutional recognition.

In 2010, another revision, promoted by President Nicolas Sarkozy, reinforced decentralisation in France. The 2010 Act on decentralisation aims at the simplification of all territorial levels, a reduction of their numbers, and the clarification of competences and financial means. General Councillors and Regional Councillors have been replaced by new Territorial Councillors, who are now elected for six years by majority vote and who sit on both General and Regional Councils.

The judicial power is exercised by the courts of law, courts of first instance, courts of appeal and supreme courts. The Constitutional Council does not form part of the judiciary, as it is supposed to exercise judicial review of the constitutionality of acts and treaties, but it also has to monitor the integrity of national elections. Its decisions are supposed to bind every single court, even the *Cour de Cassation* and the *Conseil d'Etat* (article 62 of the Constitution). France has had a dual judicial system since the Revolutionary Act of 1790 on the separation of administrative and judicial orders. On one hand, there is the administrative organisation of justice with Administrative Tribunals (*TA*), as courts of first instance, Administrative Courts of Appeal (*CAA*), and the supreme court, the *Conseil d'Etat (CE)*. On the other hand, the judicial administration of justice presents the same structure: there are tribunals of first instance, appeal courts and a Court of Cassation. The judiciary itself is divided into a civil and a criminal division. In the civil division the first instance is represented by the High Tribunal

of Instance (TGI) or Tribunal of Instance (TI) for minor cases. In the criminal division it is necessary to distinguish whether the offence is a minor one (*contravention*), an indictable offence (*délit*), or a crime (*crime*). In the first case, the "Police Tribunal" is competent; in the second case it is the "Correctional Tribunal"; and in the third case it is the "Assizes Court", which is a court based on laymen's judgments. At the upper levels, there are civil or criminal divisions for both Appeal Courts and Cassation Court. It was only in 2000, however, that appeal courts became competent to rule on an appeal for the Assizes Courts. For a long time, the thought held sway that verdicts given by citizens could not be appealed.

In order to decide which of the judicial or administrative judges would be competent in some debatable cases, a "Conflicts Tribunal" (*Tribunal des Conflits*) was set up initially in 1848, under article 89 of the Constitution of the 2nd Republic. The court was abolished by the Second Empire, but was restored by the Act of May 24, 1872. This court still has significant jurisdictional competence.

The main sources of fundamental rights can rarely be found in the constitutional sections themselves,[1] but rather in the Preamble to the Constitution of 1958, which incorporates the 1789 Declaration of the Rights of Man and of the Citizen, the Preamble to the Constitution of 1946, and the 2004 Environmental Charter. The Preamble to the Constitution of 1946 itself refers to the Fundamental Principles Recognised by the Laws of the Republic (PFRLR) and to the principles particularly necessary to our times. All these sources of fundamental rights were incorporated into what is called the block of constitutionality by the Constitutional Council in 19712 and since then, the Council has constantly referred to an evolutionary and "non-crystallised" conception of the Constitution. Such an approach shows the evolution of the French constitutional norm since 1958 and means that the constitutional jurisdiction relies on a set of norms with external references other than the Constitution itself. These bridge the gap between the past (provisions of the Declaration of the Rights of Man and of the Citizen of 1789 and of the Preamble to the Constitution of 1946) and the present (the influence of European norms on normative constitutional law). However, the European Convention of Human Rights, in common with every international source, is still not considered part of the block of constitutionality. Therefore, the ECHR does not have a constitutional value; rather, it is treaty-based .

2.a. To what extent are the national courts (and/or non-judicial bodies, such as Councils of State) empowered to review the compatibility of acts of parliament and other legislation with the Constitution?

To start with, it should be recalled that France has three superior courts (the Constitutional Council[3], the Council of State[4], and the Court of Cassation[5]) which are part of a European framework, itself comprising another two superior courts (the Court of Justice of the European Union and the European Court of Human Rights).

The Constitutional Council is the only institution entitled to exercise judicial review of constitutionality. Acts of Parliament and treaties can be challenged only by the Constitutional Council if they do not conform to the Constitution. This is called the system of constitutional review or judicial review of constitutionality. The French Constitutional Council is the only institution entitled to ensure that acts, treaties and (to some extent) European Union directives, comply with the French Constitution.

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[1] Constitutional sections dealing with fundamental rights are very rare. Exceptions can be found in Articles 3, 4, 34, 53, 72-75.
[2] Decision n°71-44 DC of 16th July 1971.
[3] *Conseil Constitutionnel*, i.e. the French Constitutional court.
[4] *Conseil d'État*, i.e. France's highest administrative court.
[5] *Cour de Cassation*, i.e. France's highest judicial court.

The institutional act[6] of 10 December 2009 regarding Article 61-1 of the Constitution (priority preliminary ruling on the issue of constitutionality (QPC[7]) — constitutional reform of 23 July 2008) confirmed the IVG precedent. This constitutional reform confirmed this clear specialisation of judges (ordinary judges/constitutional judges). Firstly, the Constitutional Council[8] has been strengthened thanks to the Constitutional reform of 23 July 2008 in its roles as constitutional judge. Its role is not to deal with issues regarding conformity with treaties: it is the sole constitutional judge of acts and nothing more. Secondly, the Council of State and the Court of Cassation are and remain the two superior courts entitled to review the conformity of acts with treaties.

2.b. If they are competent to do so, what system of Constitutional review is used, i.e.:

- **A system of concentrated review (with a Constitutional Court having the final say on the interpretation of the Constitution)**
- **A decentralized system (where all courts have the power to decide on the constitutionality of acts of Parliament)**
- **Anything in between?**

Judicial review of constitutionality is a system of concentrated review. The Constitutional Council is the only court empowered to review the compatibility of acts of Parliament and treaties with the Constitution. Ordinary courts are empowered to review the compatibility of acts of Parliament with treaties. As treaties are supposed to be compatible with the Constitution, however, the courts exercise a sort of judicial review of constitutionality. (Hierarchy of norms in French law = Constitution (art. 54 of the Constitution) > treaties (art. 55 of the Constitution) > acts of Parliament > orders/decrees > contracts/individual acts.)

2.c. If they are competent to do so, is there:

- **A system of *a priori* review, i.e. review of compatibility before an act is adopted by Parliament (e.g. advice by the Council of State)**
- **A system of ex post review**

If so, what kinds of procedures are in place?

- **Abstract and/or concrete control of norms by direct appeal?**
- **Abstract or concrete control of norms by means of preliminary questions?**
- **A combination of *a priori* and ex post review?**

The Constitutional Council is the only institution entitled to conduct constitutional review. It can do so both before an act is adopted under the procedure of Article 61 of the Constitution (*a priori* review) and after an act is adopted under the procedure of Article 61-1 of the Constitution (*a posteriori* review[9]). As far as *a priori* review is concerned, the Constitutional Council must be involved to ensure that the Constitution is not violated when institutional acts, bills based on Article 11 of the Constitution (legislative referendum) or National Assembly regulations are involved. In any other case, *a priori* constitutional review by the Constitutional Council is not mandatory. Until 1974, *a priori* review could be initiated by the President of the Republic, the Prime Minister, and the Presidents of the National Assembly and the Senate. Since 1974, along with the above, a small parliamentary group from the opposition, i.e. either 60 members of the National Assembly or 60 members of the Senate, can also initiate such a review. This *a priori* review must be carried out between the vote on a bill and its entry into force. It is an abstract review, and is coupled with a review by means of action. If the

[6] In French, "*loi organique*", i.e. constitutional act which completes the Constitution.
[7] Called in French "Question prioritaire de Constitutionnalité" (QPC).
[8] The QPC reform made the Constitutional Council a constitutional court.
[9] Or *ex post* review.

Constitutional Council considers that an act is unconstitutional, it is declared null and void, in whole or in part.

Since the implementation of the reforms in March 2010 and the introduction of the QPC system, *a posteriori* review has been used to enhance the *a priori* review, but only for laws which would infringe a liberty or right. The QPC is based on two straightforward principles: indirect approach to the Constitutional Council by individuals and a dual filter. Indeed, an approach to the Constitutional Council is available to individuals, but only through a filter. If during judicial proceedings, the court of first instance considers that a request for referral is justified, he/she will hand the case over to the higher court concerned, i.e. the Council of State for administrative law cases and the Court of Cassation for all other cases (including civil and criminal cases). If the higher court also considers the request justified, it will hand over the case to the Constitutional Council within three months. The latter has three months to rule on the constitutionality of the legislative act and again carry out an abstract review by means of action (the act is declared null and void, in whole or in part, even if it has started to exert some effects). The *erga omnes* effect of the repeal makes the QPC radically different from most mechanisms existing elsewhere in Europe, except in Ireland.

3.a. Can you briefly characterize the status of international law (treaties, decisions/resolutions by international organizations, customary international law) in the Constitutional order? Do treaties, decisions/resolutions by international organizations and/or customary law form part of the law of the land?

France is a monist state with primacy of international law, which means that international rules do not need to be transposed in order to be enforceable in domestic law. All international treaty provisions form part of the law of the land. This is true for treaties, customs, and to a lesser extent, resolutions by international organisations. The French Constitution refers solely to treaties that, under Article 55 of the Constitution, have "a superior authority to that of laws", as long as they have been ratified and approved through the regular procedure of ratification and are subject to reciprocity. This provision is also generally considered applicable to international customary law.

Regarding secondary legislation (e.g. resolutions by international organisations), it is important to distinguish ordinary resolutions from resolutions taken by the European Union. Ordinary resolutions are not legally binding on the French state, with the exception of resolutions by the UN's Security Council taken under Chapter 7 of the UN Charter. This is different for resolutions by the European Union, which are legally binding whether they are regulations or directives (review by the EUCJ).

Since the French state is a monist state with primacy of international law, it considers judgments of international courts that have had their jurisdiction approved under a treaty that has been duly ratified and approved (e.g. ECHR, ICJ, EUCJ, etc.) to be binding and restrictive, whether they are handed down in an interstate dispute, or to individuals exercising their right to an individual request under its jurisdiction.

France does not consider final observations made by the Human Rights Committee legally binding, in compliance with the 1966 agreement. This does not mean, however, that it does not respect them. On the contrary, having acknowledged that the Committee has authority to gather individual communications (1503 Procedure), France makes sure that it adopts all necessary measures to give effect to its conclusions. France takes some recommendations into account, but does not consider itself legally bound by them. Thus, the Committee has recommended for several years that France "officially" recognise ethnic, religious or linguistic minorities, in accordance with Article 27 of the Pact, but France refuses to comply with this recommendation.[10] As far as the advisory opinions of the

[10] See CCPR/C/FRA/CO/4 of 31 July 2008.

Committee given following individual communications are concerned, France manages to repair the individual consequences of a violation but does not always adopt the necessary general measures. Thus, the 4 February 2013 advisory opinion, in which the Committee denounced the fact that France gave a disproportionate sentence to the Sikh student who had been expelled from his school for refusing to remove his Sikh turban, did not trigger an amendment to Act n° 2004-228 of 15 March 2004 relating to religious symbols in public schools, but it should lead to instructions to head teachers to exercise tolerance.[11]

3.b. If so, what rank do treaties, decisions/resolutions adopted by international organisations and/or customary international law have in the national hierarchy of norms? Is there some kind of hierarchy?

International law occupies the second level of the hierarchy of norms, below the Constitutional rank and above the legislative one. (Constitution (art. 54 of the Constitution) > treaties (art. 55 of the Constitution) > acts of Parliament (art. 34 of the Constitution).)

3.c. If international law is not part of the law of the land, what guarantees are there that the state will comply with its international obligations under treaties, decisions/resolutions by international organisations, or customary international law?

The question is not applicable to the French system.

3.d. Do the competent courts apply treaties, decisions/resolutions adopted by international organisations and/or customary international law as such (i.e. as sources of international law) or are they transformed into sources of national law in the process of incorporation? Are there any differences in practical consequences between the different approaches? Or is this a mere academic question without practical consequences?

International law does not have to be incorporated into domestic law. The courts apply treaty provisions directly. The Constitutional Council can review the compatibility of treaties with the Constitution (judicial review of constitutionality, Article 54 of the Constitution), whereas the other courts can examine the compatibility of acts of Parliament with treaties (judicial review of conformity of acts with treaties).

It may be considered that not being obliged to incorporate international law into domestic legal order has a real practical impact concerning the application of public international law, and thus it is far from being a mere academic question. According to the principle of direct applicability of international law, individuals can directly invoke a rule of international law (specifically treaty provisions) before national jurisdictions, provided that the provisions invoked in support of their action expressly confer rights on them and impose clear, precise and unconditional obligations on States (for instance, see some provisions of the United Nations Convention on the Rights of the Child). Such is not the case in a dualist State.

France is not a party to the Vienna Convention on the Law of Treaties. However, since many of the provisions of this Convention merely codify customary norms, France is obliged to act in accordance with all the rules laid down by this Convention concerning the interpretation, amendment and demise of treaties.

[11] Cf. CCPR/C/106/D/1852/2008.

3.e. Would you characterize your Constitutional system as monist, dualist or a hybrid system? This question has nothing to do with priority, but only with status as such.

As mentioned above, the French system is a monist one with priority given to international law.

4. To what extent and how are the national courts empowered to review the compatibility of the Constitution, acts of Parliament, lower legislation, and other decisions taken by public authorities with treaties, decisions/resolutions adopted by international organisations and/or customary international law?
If they are:
a. Are all courts competent to do so (i.e. a decentralised system of judicial review) or is the competence limited to designated judicial bodies (e.g. a Constitutional court or the highest courts)?

The Constitutional Council is the only institution entitled to review the conformity of treaties with the Constitution, under Article 54 of the Constitution. As for all other judges, that is to say ordinary judges, they are able to carry out both a conventionality review and a judicial review. They will check that all rules below treaties in the hierarchy of norms comply with these treaties ; and if they do not comply, as far as an act is concerned, they can set it aside via a conventionality review, and, as far as other rules e.g. regulations are concerned, declare them null and void via a judicial review.

Although international treaties — such as the European Convention on Human Rights — have an "authority superior to that of laws" under Article 55 of the French Constitution, they are not assimilated to constitutional provisions, and the Constitutional Council has no jurisdiction to decide whether the law conforms with treaties.[12] Indeed, since 1975, the Council has considered that, under Article 61 of the French Constitution and as part of the *a priori* judicial review of constitutionality of laws, it is not its role to examine the compatibility of an act with France's international and European commitments. By this 1975 decision, the Constitutional Council thus enabled both judicial and administrative courts to decide on the issue of the conformity of acts with treaties and, if they consider that an act is contrary to a treaty, to implement the latter rather than the former. This is what is called in France the judicial review of conventionality,[13] i.e. judicial review of conformity with treaties.

The Constitutional Council, in the case of 15 January 1975 pertaining to the Voluntary termination of pregnancy Act, decided that, in spite of the principle of primacy of treaties over acts provided by Article 55 of the Constitution, it was not entitled to ensure that acts of Parliament comply with France's international agreements, including the ECHR. "It is therefore not for the Constitutional Council, when a referral is made to it under Article 61 of the Constitution, to consider the consistency of a statute with the provisions of a treaty or an international agreement".[14] This decision is based on one major argument: Article 61 of the Constitution. "Article 61 of the Constitution does not confer on the Constitutional Council a general or particular discretion identical with that of Parliament, but simply empowers it to rule on the constitutionality of statutes referred to it".[15] In its subsequent decisions, the Council explained what was only implicit in the 1975 case: if the review of the superiority of treaties over acts cannot be carried out as part of a constitutionality review of acts, it must be carried out by ordinary courts under the control of the Court of Cassation and the Council of State. "It is indeed (…) for the different institutions of the State to ensure that the international conventions are

[12] 15 January 1975, IVG decision, AJDA, 1975, p. 134, note Rivero.
[13] In French, "contrôle de conventionalité".
[14] Cons.const.Décis. n° 74-54 DC of 15 January 1975, Rec. Cons. const. 19.
[15] Cons.const.Décis. n° 74-54 DC of 15 January 1975, *op.cit.*

applied, within their respective jurisdictions".[16] The Court of Cassation responded very promptly to this invitation in the 24 May 1975 case, not long after the Constitutional Council's 1975 decision. The Court of Cassation considered that Article 95 of the Treaty of Rome, which prohibits any obstacle to fair competition, had to prevail over legislative provisions providing for the taxation of imported coffee, even though these legislative provisions had been adopted subsequently to the Treaty of Rome.[17] The Council of State, which has always been more respectful of the law's sovereignty, took far longer (almost fifteen years) to acknowledge the superiority of a treaty over a subsequent act of Parliament. In its plenary decision of 26 October 1989, the Council of State considered that the Treaty of Rome had to prevail over an act of 1977 relating to the organisation of the European Parliamentary elections, even though this act was subsequent to the treaty.[18]

4.b. Are the courts competent to give priority to international law if national law conflicts with treaties, decisions/resolutions adopted by international organisations and/or international customary law? If so:

- **Is this competence based on national (Constitutional) law? Or is it inferred from the nature of international law (e.g. the nature of self-executing treaties or the principle of *pacta sunt servanda*)?**

As mentioned above (answer to Question 4.a), ordinary judges are competent to carry out both a conventionality review and a judicial review. They will check that all rules that rank below treaties in the hierarchy of norms comply with these treaties. If they do not comply, as far as an act of parliament is concerned, they can set the act aside via a conventionality review, and, as far as other rules (e.g. regulations) are concerned, declare them null and void via a judicial review. The courts are competent to give priority to international law if domestic law conflicts with treaties, binding resolutions adopted by international organizations and/or international customary law.

This competence stems from Article 55 which merely translates the traditional position of France arising from the saying *pacta sunt servanda*. The competence of French jurisdictions is based on this Article and this Article alone: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party."

- **Which formal competences do the courts have to give such priority (e.g. disapplying national law in the case at hand, declaring national law null and void)?**

The Constitutional Council is the only institution which can review the compatibility of treaties with the Constitution. Two solutions exist if the Constitutional Council holds that a treaty contains a provision contrary to the Constitution : either the Constitution is amended to allow the treaty to be ratified, or it is not, and the treaty never applies for lack of ratification. Art. 54: "If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution."

The other courts examine the compatibility of acts of Parliament with treaties. In a case of conflict, the legislation will not be applied.

[16] Cons.const.Décis. n° 86-216 DC of 3 September 1986, Rec. Cons. const. 135; n° 89-268 DC of 29 December 1989, Rec. Cons. const. 110.
[17] Ch. Mixte 24 May 1975, *Société des Cafés Jacques Vabre*, *D.* 1975, p. 497, concl. Touffait.
[18] Ass. plén. 20 October 1989, *Nicolo*, *Rec.* p. 190, concl. Frydman.

As for other sources of law, such as regulations, individual decisions, etc., they can be declared null and void by judges in the name of the Rule of Law.[19]

– **Is there a difference between priority over legislation/acts of Parliament and priority over the Constitution?**

International law (hence, as mentioned above, treaties and custom) is ranked above acts of parliament in the hierarchy of norms (Article 55), but is not considered as above the Constitution (*a contrario* reading of Article 54). If a treaty contains a provision which is unconstitutional and is considered as such by the Constitutional Council, and if the Constitution is not amended by constitutional review, the treaty in question will never be ratified and the Constitution will prevail in any case. In the French system, the determination of compatibility of treaties with the Constitution falls within the sole jurisdiction of the Constitutional Council. If a treaty did not appear to be unconstitutional when it was ratified, but it turns out later that it is contrary to the Constitution, nothing can be done *a posteriori* by the Constitutional Council. However, in such a case, nothing prohibits judges from allowing a constitutional provision to prevail over a conventional provision.[20]

– **Does declaring an act null and void have *ex tunc* effect or *ex nunc* effect, or is it possible for the court to set a time limit for the legislature to make amendments before the act loses its legal effect?**

Regarding the Constitutional Council and in the particular case of the QPC, the Constitutional Council has the possibility under Article 61-1 as amended by the institutional act of 10 December 2009 to postpone the effects of the repeal of one act in order to allow Parliament to adopt another act in the interim. Nevertheless, this is a clear exception to the rule. Whether the Constitutional Council decides on a complete or partial repeal of an act by *a priori* or *a posteriori* review, this repeal in principle has immediate effect.

5. Can parliament and/or the government play a role in determining whether an act of parliament which has been already been enacted and entered into force is compatible with the Constitution and/or international law?

It is up to neither the Parliament nor the Government to say, when an act has just been adopted, that it is not in conformity with the Constitution or with international law. The “référé législatif” (i.e. a suspended judgment in order to ask Parliament for clarification about an act) disappeared in France since full recognition of Article 4 of the 1804 Civil Code and its invitation to judges to interpret the statutes concerned. “A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice.”

[19] Known as “principe de légalité” in France.
[20] CE 30 October 1998, *Sarran*, note B. Mathieu et M. Verpeaux, *RFDA* 1999, p. 67.

PART 2 – Competences and techniques of national courts to apply the ECHR (or avoid violations of the ECHR from occurring)

6.a. Do all the substantive provisions of the ECHR (including the various substantive protocols) have direct effect, i.e. are they self-executing/directly applicable? Or are some of the (substantive) provisions of the ECHR and its protocols considered to be of such a nature that they can only be implemented by means of legislative measures?

All the provisions of the ECHR together with its substantive protocols have direct effect. In accordance with the possibility given by the Constitutional Council to ordinary judges to carry out a review regarding the conformity of laws with international conventions, the judges have never hesitated to prefer the provisions of the ECHR over French law, and to have this Convention prevail over a French act that does not comply with it.

As mentioned above, the direct implementation of the conventional rule within the French domestic legal order and the definition of its rank in the hierarchy of norms result from Article 55 of the Constitution of 4 October 1958. Therefore, international treaties are ranked above the laws but necessarily below the Constitution since their legal authority in the domestic legal order emanates from the Constitution. The Council of State, in its plenary decision[21] of 30 October 1998 (*Sarran, Levacher and others*), clearly established the principle that "the supremacy conferred (by Article 55 of the Constitution) to international agreements does not apply, in the domestic legal order, to constitutional provisions." The Court of Cassation handed down a similar decision.[22] By recognising the Constitution as the superior norm in the French legal order, the superior courts refuse to commit themselves to reviewing the conformity of the Constitution with international conventions, i.e. to reviewing the conformity of a constitutional provision with a conventional one.

In addition, the Council of State has recently given an extensive interpretation of the notion of direct effect, which applies *a fortiori* to the ECHR.[23] Reversing the presumption of the absence of direct effect of the conventional norm, the Council of State states that an international convention normally has direct effect except if it has "for [its] exclusive purpose the governance of the relationships between States" and even if "the stipulation commits the States parties to perform the obligation it defines". From now on, it is clear that the direct effect is no longer subordinated to the intention of the parties, as expressed in a treaty's wording.

The provisions of the ECHR have always been recognised as sufficiently precise, both in their object and in their form, to be directly applicable in the French legal order without any additional measures for execution. This applies to the provisions of the ECHR, Title 1 and its Protocols 1, 4, 6 and 7. Neither the French (civil and criminal) courts nor the administrative tribunals have objected to admitting the direct applicability of all the provisions of the ECHR. One might wonder whether Article 13, which guarantees "the right to an effective remedy" in the domestic legal order, had direct effect because the exercise of this right requires that a remedy has been previously established in domestic law. Nonetheless, the domestic judge admits that Article 13 can be invoked directly before him or her.[24] As the French law currently stands and as the flourishing case law shows, all the provisions of the ECHR receive obvious, direct applicability.

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[21] That is to say, in French, arrêt d'Assemblée which means a decision taken by the whole institution.
[22] Cass. Ass. Plén. 2 June 2000, *Fraisse*.
[23] CE. Ass. 11th April 2012, *Gisti*.
[24] For instance, CE 26 February 2003, *Merkhantar*, n° 241385.

6.b. To the extent that the substantive provisions of the ECHR and its Protocols are considered to be self-executing / directly applicable / have direct effect, does this ipso facto mean that these provisions result in subjective rights enforceable before the national courts? Or are there any substantive provisions that are considered to be self-executing, but may not result in subjective rights? If so, please give examples.

The strength of the European system concerning the protection of fundamental rights depends in part on the recognition of the direct effect of the conventional provisions that can be invoked before the national judge. In the *Raspino* case of 3 June 1975, the Criminal Chamber of the Court of Cassation established the direct applicability of the ECHR by judging that "the Indictment Chamber had to decide according to the provisions of the European Convention on Human Rights and Fundamental Freedoms which, regularly promulgated in France, confers direct rights to individuals under French jurisdiction."

This direct effect has a very concrete result, because the Court of Cassation has to apply the provisions of the ECHR not only in relations between the State and citizens, but also in relationships between individuals (see below, question 7).

Neither the French judicial judge who paved the way in the *Raspino* case, nor the administrative judge found it difficult to admit the direct applicability of the ECHR as a whole.[25] One might wonder if Article 13 had direct effect since the enjoyment of this right implied that the domestic law had previously allowed an action. Nonetheless, domestic judges admit that Article 13 can be invoked directly before them.[26]

6.c. If some of the substantive provisions of the ECHR and its Protocols are considered to be of such a nature that they can only be implemented by means of legislative measures, are the national courts nevertheless competent to apply those provisions to establish state responsibility in cases where those provisions have been violated?
If so, which remedies are possible? E.g.:

1) **Are the national courts competent to order the state or its bodies to compensate for the damage caused by violations of non-self-executing provisions of the ECHR and its Protocols?**
2) **Are the national courts competent to order the State to adopt (legislative) measures which are necessary to implement non-self-executing provisions of the ECHR and its protocols?**

Nothing has been found on that question in the French system.

7. The case law of the ECtHR includes (positive) obligations on national courts to apply the Convention in relations between private parties (i.e. in horizontal relationships). Courts must refrain from interpreting contractual obligations in violation of the ECHR (*Khurshid Mustafa & Tarzibachi*, *Pla & Puncernau*). When deciding on horizontal conflicts between rights (e.g. the right to freedom of expression and the right to respect for one's reputation) they have to take account of the ECHR, and sometimes they are required to interpret national law in a specific manner (e.g. family law cases should always be decided in concreto, taking the best interests of the child into account). Do the national courts indeed apply the relevant ECHR provisions

[25] See the reports of R. Abraham and F. Sudre in "Le juge administratif et la CEDH", *RUDH* 1991, p. 275 and 259.
[26] See e.g. CE 12 March 1999, Lo, n° 200012; CE 24 June 2002, *Préfet de la Haute-Garonne v. M. Terzout-Yettou,* n° 2154000; in addition to the *Merkhantar* case, discussed below.

(or the corresponding provisions of the incorporating act) to cases between private parties, in compliance with the case law of the ECtHR?

The jurisdiction of the domestic judge in applying the ECHR is not subject to the same conditions as the jurisdiction of the European Court, including the admissibility of the request. Nothing therefore prevents the French judge from applying the Convention to private disputes, in the same way as the ECtHR has admitted for a long time, i.e. by means of the theory of "positive obligations", the applicability of the Convention to private relationships. The question of the "horizontal effect" of the Convention is merged here with the question of the direct applicability of the conventional rules in the domestic law and their application by national courts to private disputes. As Professor Coussirat-Coustère puts it, "the Convention is part of the legality the judge has to comply with and, therefore, the direct effect of the guaranteed rights is not only vertical (litigation in public law) but also horizontal (litigation in private law)."[27] The direct effect exists concretely, since the Court of Cassation is driven to apply the provisions of the Convention, not only to relations between the State and citizens, but also to private relationships (i.e. between individuals/companies). In this respect one can mention the relationships between employees and employers in litigation over the right to the respect for the home and the necessary geographic mobility of the company; or the relationships between co-owners, when it is necessary to reconcile the respect for religious liberty guaranteed by Article 9 of the ECHR and the collective life in an apartment block in compliance with its purpose determined by the co-ownership regulations; or the relationships between parents and children, when, in the event of separation, it is necessary to decide on the exercise of parental authority while ensuring family life be respected.[28]

More precisely, the Court of Cassation announced a remarkable application of Article 8 of the ECHR to private relationships.[29] Admitting that contract law is covered by the Convention, the Court considered that the provisions of a lease agreement cannot, "under Article 8 § 1 of the ECHR, have the effect of depriving the tenant of the possibility to accommodate his/her kin".[30] The Court of Cassation also applies Article 8 to labour relations.[31]

On the basis of Article 2 of the ECHR, the Council of State gives the penitentiary authorities the positive obligation to "take the necessary measures to protect the lives" of prisoners, for example by allowing ordinary inmates non-flammable mattresses.[32]

The courts have to interpret civil law (e.g. provisions of the Code Civil) and even contractual clauses in the line of the case law of the ECtHR, but there is also a possibility for the courts to apply ECHR provisions *directly*, *i.e.* as such, in horizontal relations.

8. Are there examples of cases in which national legislation or national decisions have been set aside / declared null and void / disapplied because of a conflict with the ECHR?

The judicial review of conformity of laws with the ECHR has become a daily task of the judicial and administrative jurisdictions. They no longer hesitate to set aside an act or a regulation they consider contrary to the ECHR. This type of question is now very frequently raised before the courts, especially with respect to Article 6 of the ECHR relating to the right to a fair trial. Indeed, ordinary, admin-

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[27] "Convention européenne des droits de l'hommes et droit interne: primauté et effet direct", in L.E. Pettiti et al., *La Convention européenne des droits de l'homme* (Némésis 1992) p. 14.
[28] For instance, Civ. 1ère 17 January 2006, pourvoi n° 03-14.421, *Bull. civ.* I, n° 10.
[29] Cass. civ. 1ère 23 October 1990, *Bull.*, I, n° 222 p. 158: infringement of the respect for private life by a news agency and Article 8; Cass. civ. 1ère 27 February 1991, *Camuset* v. *Casino Guichard-Perrachon*, Bull., III, n° 67 p. 39: damages in case of eviction when a commercial lease is not extended.
[30] Cass. 3ème civ. 6 March 1996, *OPAC de la ville de Paris* v. *Mme Mel Yedei*, *D*, 1997, 167, note B. de Lamy.
[31] Cass. soc. 12 January 1999, *Spileers*, *D*, 1999, Jur., p. 645.
[32] CE 17 December 2008, n° 305594, Section française de l'Observatoire international des prisons.

istrative or judicial judges do not hesitate to set aside the applicability of an act, on the grounds of its "inconventionnalité", that is to say the fact that it is contrary to the ECHR. Following the *Zielinski and others* case of the ECtHR for example, several ordinary courts have thus set aside the application of the litigious validation act, as it was contrary to Article 6 of the ECHR.[33]

8.a. Can you estimate if this occurs frequently / sometimes / rarely?

It has occurred frequently in the past, but is rarer nowadays. This can probably be explained because the Parliament and the public authorities now take better account of the provisions of the ECHR and the ECtHR's case law.

8.b. If constitutional review is possible: can you estimate if the constitution is used more often / just as often / less often than the ECHR as a basis for holding that legislation or decisions do not comply with fundamental rights norms?

Since the QPC was introduced in France in 2008 and implemented in 2010, some violations can henceforth be filtered to the constitutional level. In this way, the Constitutional Council has reinforced its influence. Even though the introduction of the QPC reaffirms the place of the Council in that context, it seems that the ECHR still serves today as a constant interpretive reference for the Constitutional Council and that the protection guaranteed by the ECtHR also remains more efficient.

8.c. Are there any examples where the court has declined to use its competence to set aside national legislation / decisions in order to respect separation of powers (between the courts and the legislature or between courts and administrative bodies) or the sovereignty of parliament?

Review of national legislation
In its QPC decision of 6 October 2010, the Constitutional Council recalled that it is not entitled to substitute the view of the legislator with its own appreciation. On 9 July 2010, according to the conditions established by Article 61-1 of the Constitution, the Court of Cassation submitted to the Constitutional Council (case n° 12143 of 8 July 2010) a QPC requested by Mrs Isabelle D. and Mrs Isabelle B., concerning the conformity of Article 365 of the Civil Code with the rights and liberties guaranteed by the Constitution. It considered that, by maintaining the principle according to which the faculty to adopt as a couple is allowed only to spouses, the legislator estimated, in the exercise of its competence granted by Article 34 of the Constitution, that the difference in situation between married and unmarried couples could justify, in the interests of the child, different treatments concerning the establishment of an adoptive filiation towards under-age children. The legislator had added that the Constitutional Council could not substitute its appreciation for that of the legislator concerning the consequences of the particular situation of children raised by two persons of the same sex. Thus the Constitutional Council concluded that the complaint about breaching Article 6 of the 1789 Declaration had to be set aside. The Constitutional Council also considered that Article 365 of the Civil Code was not contrary to any right or liberty guaranteed by the Constitution.

In its QPC decision of 28 January 2011 regarding the request for same sex couples to be granted access to the status of marriage, the Constitutional Council upheld its case law, which is respectful of

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[33] CA de Limoges 13 March 2000, Polyclinique Saint-Damien v. CMSA Corrèze, D, 2000, IR, 127; CAA Nancy 5 December 2000, Caisse primaire d'assurance maladie de Metz and Caisse régionale d'assurance vieillesse d'Alsace-Moselle, AJDA 2001, 278, note P. Rousselle; RFDA 2001, 752, obs. D. Giltard.

the jurisdiction of the legislator and the separation of powers. In this case, the Constitutional Council was approached by the Court of Cassation on 16 November 2010 (first civil division, case n° 1088 of 16 November 2010), under the terms of Article 61-1 of the Constitution, in reference to a QPC introduced by Mrs Corinne C. and Mrs Sophie H, regarding compliance with the rights and liberties laid down in Articles 75 and 144 of the French Civil Code and guaranteed by the Constitution. The Constitutional Council dismissed the claim and recalled that freedom to marry did not restrain the jurisdiction conferred by Article 34 of the Constitution to the lawmaker when setting the conditions for marriage, provided that in the exercise of this jurisdiction the lawmaker does not deprive constitutional requirements of their legal guarantees.

Review of national administrative decisions
On the other hand, judicial review allows the administrative judge to repeal any administrative decision that might contravene a rule with which it has to comply in the hierarchy of norms. The administrative judge cannot go beyond this jurisdiction. Nevertheless, he/she is entitled to require that the French administration, for example, take a new measure that will be more appropriate than the previous one.

9. Are the national courts competent to order the national legislature to bring national law into conformity with the ECHR by means of amending or introducing legislation?

No, the courts do not enjoy such jurisdiction so they cannot act in contradiction with the principle of separation of powers.

The Constitutional Council is only entitled to issue interpretive reservations when conducting an *a priori* constitutional review of an act. When such reservations are issued, it means that the act does not violate the Constitution providing it is applied or interpreted in the sense found by the Council in these reservations.

10. Do national courts strive to interpret national law (including the national constitution) in harmony with the ECHR?

Yes, all the courts do, including the Constitutional Council (*cf.* above). But they do not always manage to do so, as the following examples show. Note, however, that these are exceptions rather than the rule.

The *Aznar* v. *France* case of the ECtHR, which requires that a statement must be communicated,[34] even when it does not contain any new element, did not, for example, lead the administrative court to modify its practice. Indeed, the non-communication of superfluous statements helps avoid slowing down proceedings unnecessarily. Another example: the Council of State specified which doctors were authorised to establish a detailed certificate, thanks to which the Prefect may decide on the compulsory hospitalisation of a person suffering from mental disorder, without requiring that this certificate be established, in all circumstances, by an "expert doctor", even though the ECtHR requires so.[35] Another example can be given : while the Constitutional Council understands the notion of "security detention" as a security measure, the ECtHR understands it as a sentence.[36]

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[34] The Government Commissioner has now the obligation to communicate before the hearing the "general sense" of his conclusions to the party making such a request.
[35] CE sect. 9 June 2010, *Lavallé*; to read with ECtHR 24 October 1979, *Winterwerp* v. *the Netherlands*, appl. no. 6301/73; ECtHR 5 October 2000, *Varbanov* v. *Bulgaria*, appl. no. 31365/96.
[36] Cons. Const. 21 February 2008, n° 562 DC, *Rec. Cons. Const.* 89.

11. Do national courts try to avoid conflicts with the ECHR by means of constitutional review or construing national law in conformity with the constitution (*Verfassungskonforme Auslegung*)?

Yes, all the courts do. The Constitutional Council via an *a priori* constitutional review or the QPC, and ordinary courts via judicial review of conformity of laws with treaties.

By means of construing national law in conformity with the constitution
The European Court has sometimes found an intermediate in the intervention of the administrative or ordinary judge. What is revealing in this regard is that the judge's intervention in summary freedom proceedings compels the administration, except when there are imperative demands of law and order, to comply with a decision of the ECtHR indicating, in application of Article 39 of its Regulation, that it should not proceed with the deportation of a foreign person during proceedings before the Court (CE, ord., 30th June 2009, *Ministre de l'Interieur v. Beghal*). The Council of State in this case really used the constitution as a vehicle to avoid a violation of the Convention. Regarding the judicial judge, requirements laid down by Article 5 of the Convention, for example, have been implemented in several cases before the Court of Cassation. The issue of granting compensation for harm caused by people inadmissibly being thrown into psychiatric hospitals against their will has given the judicial judge the opportunity to interpret, under Article 5 of the ECHR, rules on the four-year term applicable to claims against the state, positively for persons who are wrongly hospitalised, victims of an illegal deprivation of liberty (Civ. 1ère, 31st March 2010, Pourvoi n° 09-11.803.).

By means of constitutional review
It should not be forgotten how close the rights and freedoms guaranteed by the Constitution and those guaranteed by the Convention are today. The Convention covers more or less all fundamental rights as they stem, in France, from the 1958 Constitution and its Preamble, the 1789 Declaration, the Preamble to the 1946 Constitution and the fundamental principles recognised by the French laws to which they refer. At the same time, the Constitutional Council has deduced rights recognised by the ECHR and the precedents of the Court, from these texts. The Constitutional Council ensures that its review power is fully coherent with that of the Strasbourg Court. In its decision number 2010-1 QPC taken on 28th May 2010, for instance, the Constitutional Council had to recognise special pension schemes applicable to immigrants from countries and territories that used to be under French sovereignty. The Constitutional Council then declared that the provisions contested, which previsioned different revaluation conditions for pension holders living abroad depending on whether they were French or foreign, were unconstitutional, as they conflicted with the principle of equality. Here, the Strasbourg Court was one of the central elements in the Council's thinking. In 2010, the Constitutional Council was led to censure four provisions that had previously been declared compatible with the ECHR but criticised as part of a QPC. These four QPCs led to the repeal of the contested provisions: crystallisation of pensions as explained above; ineligibility instituted by Article L-7 of the Electoral code; free transfer of land; the retroactive law on intangibility of the opening balance sheet of the first non-prescribed practice. This shows that conventional and constitutional protections are not in contention but are complementary: they share the same conception of the scope of rights and freedoms and consideration of the case law of the Court.

12. Do national courts use EU law as a vehicle to review the compatibility of national law with the ECHR?

French judges refer to the ECHR more often than to the Charter. First, it is important to know the scope at issue in the case since the Charter is only applicable when it concerns the *implementation of European Union Law*. Now, the interpretation considered in such provisions is that given by the CJEU,

as well as the one given by the domestic courts. The issue of the applicability of the Charter undoubtedly depends on this point. In French Law, an unusual case of the Criminal Chamber of the Court of Cassation, 28 June 2011, concerning the principle of proportionality of penalties, should be noted. This principle, provided in Article 49 § 3 of the Charter, was invoked before the Criminal Chamber of the Court of Cassation in a case regarding the performance of a European arrest warrant, as single motive regarding Article 6 of the ECHR, but only because the latter does not provide this rule.

13. Is there a preferential order in the use of techniques (i.e. treaty-conform interpretation, setting aside national law, ordering the legislature to amend legislation, constitutional review, Verfassungskonforme Auslegung) to avoid violations of the ECHR?

There is not really a hierarchy of techniques. Rather, it is the court involved that decides how problems should be solved. It should be recalled that the Constitutional Council is the competent court for the judicial *a priori* review of constitutionality or for answering a QPC; the other courts then carry out a conventionality review which will result in making the interpretation of the Convention prevail, and any national law which is contrary to a treaty will be set aside if need be.

PART 3 – Dealing with the judgments and decisions of the ECtHR

14. Do the national courts, when interpreting and applying ECHR provisions, refer to judgments/decisions of the ECtHR?
14.a. If so, do they do this standardly / frequently / sometimes / rarely?

The national courts, when interpreting and applying ECHR provisions, refer to judgments or decisions of the ECtHR standardly, or at least frequently.

14.b. Does it make a difference if your state was not a respondent party to the case at hand? I.e., do the courts generally refer to the case law of the Court as a whole (*res interpretata* effect), or is special importance given to the judgments/decisions to which the state has been a party?

France has been evolving in this respect. The judicial judge has never hesitated to use the ECHR when domestic law was lacking. One example can be given concerning the “reasonable time” of article 5 § 3 of the Convention.[37] Another example can be given when France was found against in the *Brusco* case of 14 October 2010 by the ECtHR because of the incompatibility of its police custody system with many of the provisions of the ECHR. The Court of Cassation did not hesitate to respond quickly, in order to answer the prescriptions of the Brusco case, in an important decision taken only six days after the ECtHR handed down its decision (19 October, 2010). Even though the administrative judge traditionally showed greater reluctance to conform to the ECtHR’s decisions, he finally sanctioned, for instance, some removal orders because they affected the collective expulsion of aliens, which is prohibited by article 4 of Protocol 4. That was in 1988. Concerning the right to respect for private and family life, the Council of State took an important decision in its *Beldjoudi* case on 18 January 1991, in order to respect the European case law in this area. It is also holds for disciplinary law, which complies with all the provisions of article 6 § 1 of the ECHR.[38]

[37] Versailles, Ch. d’acc. 13 July 1989, *Gaz. Pal.*, 4 and 5 October 1989, note L.E. Pettiti.
[38] CE, Ass 3 December 1999, *Didier*, *AJDA* 2000, p. 126.

15. How do courts respond to judgments of the ECtHR in cases to which the state has been a party?
15.a. What general methods exist for the national courts to respond to such judgments (e.g. reconsidering a case after reopening; changing interpretation of national law in similar cases)?

Changing interpretation and case law
Judges in both administrative and judicial orders are considered as the *juges conventionnels de droit commun* (ordinary judges in charge of implementing international law) in that they are the first to apply the ECHR. In practice, they often seem inclined to change their case law in response to judgments of the Court against France. A few examples may serve to illustrate this point.

First, when the case law of the Constitutional Council on “legislative validations” (means by which the French legislator intervenes, retroactively or preventively, to validate an administrative act that has been previously or is likely to be cancelled) was undermined by the *Zielinski, Pradal, Gonzalez et al.* v. *France* case,[39] the guardian of the Constitution immediately re-examined its requirements to review this method affecting the separation of powers.

A second example concerns the *Kress* and *Martinie* v. *France* cases.[40] These cases were to affect the foundations of Justice in France as they involved procedural characters who had long been considered “exemplary” (*commissaire du gouvernement*[41] and *avocat général*[42]). Administrative and judicial proceedings were eventually amended as a result of many debates among both judges and academics. The prevalence of the Court's point of view only emerges where there is a difference of interpretation with the domestic judge. For the French lawyer, the field of divergence has been whether a legislative validation was justified by “overriding reasons in the general interest” with regard to the Convention or by “sufficient general interest” on a constitutional level. In such cases, the Court’s judgment has ended up prevailing. Pursuant to the *Zielinski, Pradal Gonzalez and others* v. *France* case decided on 28 October 1999, the Constitutional Council has indeed altered its previous precedents following the same line as the Court.[43] The Council of State followed suit in its case “*Societe Laboratoire Genevrier*” on 23 June 2004.[44]

Another example: when the French legislation on hunting was directly condemned by the *Chassagnou et al.* v. *France* case,[45] both the French legislator[46] and the supreme administrative judge[47] immediately agreed to conform with the conventional standard.

Examples of judicial follow-up of ECtHR judgments against France can also be found in administrative case law. For example, whereas the Council of State first considered that the decree-law of 6 May 1939 concerning foreign publications was in accordance with Article 10 of the ECHR, which protects freedom of expression and freedom of opinion,[48] it declared the refusal to repeal this decree illegal[49] after the conviction by the Court of Strasbourg in the case of *Association Ekin*[50].

Similarly, the *Mme Vignon* case of the Council of State, 27 October 2000, followed the conviction of France by the Court of Strasbourg due to excessive violation by the 10 July 1964 Property Act of

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[39] ECtHR (GC) 28 October 1999, appl. nos. 24846/94 et al.
[40] ECtHR (GC) 7 June 2001, appl. no. 39594/98 and ECtHR (GC) 12 April 2006, appl. no. 58675/00 respectively.
[41] Who is a member of the French administrative jurisdiction whose mission consists, during public hearings, of analysing the dispute and offering a solution.
[42] Who is a representative of the French Public Prosecutor before the Court of Cassation, the courts of appeal and the French *Cours d'assises.*
[43] Cons. const. 21 December 1999, N99-422 DC; Cons. const. 29 December 1999, N99-425 DC.
[44] For a more recent application, the reader may refer to CE, sect. 10 November 2010, *Commune de Palavas-les-flots*.
[45] ECtHR (GC) 29 April 1999, appl. nos. 25088/94, 28331/95 and 28443/95.
[46] Voynet's Act, 26 July 2000.
[47] CE 9 November 2007, Lasgrezas et Association pour la protection des animaux sauvages.
[48] CE 9 July 1997, *Association Ekin*.
[49] CE 7 February 2003, *GISTI.*
[50] *Association Ekin* v. *France*, ECtHR 17 July 2001, appl. no. 39288/98.

Article 1 of the first additional protocol to the ECHR relating to the right to peaceful enjoyment of possessions.[51] This conviction also led to the reform of the 1964 Act by a statute of 24 July 2000 pertaining to hunting matters.

Sometimes, the response to the requirements of the Convention can even trigger genuine creations of law. In *the Garde des Sceaux, Ministre de la Justice* v. *M. Magiéra* case, the Council of State considered that "when the right to be judged within a reasonable time was not complied with and caused damage to people subject to legal proceedings", they were entitled to be awarded compensation for the damage caused by the defective functioning of the public service of justice.[52] The appropriation of European case law concerning the right to be judged in a reasonable time thus led to the creation of a new regime of liability of the State for this kind of malfunctioning of the public service of justice.

Finally, there are several cases where the appropriation of a decision by the Council of State happened more spontaneously: the French judge decided to adopt the European case law without waiting to be actually forced to do so. The administrative judge thus decided to strengthen its conventionality review of legislative validations, giving priority to the review of these legislative validations with the ECHR, either concerning the right to a fair trial protected by Article 6 § 1[53] or concerning the right to peaceful enjoyment of possessions.[54] The *Société Laboratoire Génévrier* case of 23 June 2004 took into account the requirement of a compelling motive of public interest, thereby showing that the Council of State is willing to adopt the exact mode of reasoning of the European judges as found in the *Zielinski, Pradal, Gonzales and Others* v. *France* case of 28 October 1999. This will was clearly reaffirmed in the advisory opinion *Provin* which states, in this matter, instructions which constitute an exact summary of the Court case law.[55]

Liability claims

It can thus be concluded that the French courts usually amend their interpretations and case law in order to comply with judgments of the ECtHR against France. Quite another question is whether judgments of the ECtHR may give rise to successful liability claims against the state. Interestingly, the conventionality review of legislative validations established a new State liability regime since the previous legislation ignored France's international commitments.[56] But in principle, the Council of State strictly restricts the scope of any final judgment made by the ECtHR to the parties involved.[57]

Reopening of criminal proceedings

As regards the reopening of criminal proceedings, the criminal division of the Court of Cassation considers that a sentence by the ECtHR, "while allowing the claimant to ask for damages, does not affect the validity of the procedures in the domestic law"[58] or, more generally, has "no direct impact on the decisions of national courts in the domestic law".[59] By incorporating a reconsideration of a criminal procedure condemned by the ECtHR into the domestic law in 2000, the French lawmaker invited the criminal division to 'qualify' its position. Article 626-1 of the French Code of Criminal Procedure now reads: "The reconsideration of a final criminal decision may be requested for the benefit of any person judged guilty of an offence, where this conviction is held, in a judgment given by the European Court of Human Rights, to have been declared in violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, or its additional Protocols, and where the

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[51] *Chassagnou and Others* v. *France*, ECtHR (GC) 29 April 1999, appl. nos. 25088/94, 28331/95 and 28443/95.
[52] CE 28 June 2002.
[53] CE 5 December 1997, *Mme Lambert*.
[54] CE 11 July 2001, Ministre de la Défense i Préaud.
[55] CE section 10 November 2010, *Commune de Palavas-les-Flots*.
[56] For further details, CE Ass. 8 February 2007, *Gardelieu*, *RFDA* 2007, p. 361, concl. L. Derepas.
[57] See as an example, CE 24 November 1997, *Société Amibu Inc.*, *RFDA* 1998, p. 978.
[58] Crim. 3 February 1993, *Kemmache*, *D*, 1993, p. 515, note J-F Renucci.
[59] Crim. 4 May 1994, *Saïdi*, *JCP G*, 1994, II, 22349, note P. Chambon.

declared violation, by its nature or seriousness, has led to harmful repercussions for the convicted person, which the 'just satisfaction' granted under article 41 of the Convention cannot bring to an end."

15.b. Do national courts generally comply with the ECtHR's judgments?

Yes, cf. below.

15.c. Do national courts try to modify or limit the effect of the Court's judgments, e.g. by modifying the Court's interpretation to fit in as far as possible with the national legal system and the national legal traditions?

It depends on the subject matter. For more detail, see the answer to Question 16.

16. How do courts respond to judgments/decisions of the ECtHR in cases to which the state has <u>not</u> been a party?

Even though States that are not directly concerned by such cases do not necessarily have to comply with them, more and more States, in fact, do try to avoid a potential sentence from the Court of Strasbourg by conforming to its case law. Therefore, the authority of the cases of the Court of Strasbourg plays a significant role, at least *de facto*, even for the States that are not party to a dispute. The courts are following this overall movement.

Today, it seems that France's highest courts are inspired by and rely on the case law of the Court of Strasbourg, including the cases regarding violations committed in other States. In France, for instance, as regards respect for private and family life (Article 8 of the Convention), the courts have taken into account the Court's case law on the law relating to aliens, the Council of State basing its position on the Court's case law which protects the rights of aliens forcibly expelled from national territory. In the light of the 1988 *Moustaquim* v. *Belgium* case, the Council of State amended its case law on the deportation of aliens in 1991. Another example: the Council of State ended up adopting without question the solution chosen by the ECtHR in the *Vilho Eskelinen and Others* v. *Finland* case of 19 April 2007. From 12 December 2007, the *Siband* case has thus allowed the applicability of Article 6 to the disputes judges have to deal with.

16.a. Do the national courts apply a strict 'mirror principle' approach, i.e. do they apply the Court's interpretations as carefully and strictly as possible without offering more or less protection to fundamental rights?
16.b. Do the national courts (sometimes) provide more protection to fundamental rights, e.g. by consciously applying national constitutional provisions or interpreting the ECHR provisions in a more protective manner?

Indeed, it seems that a mirror principle approach prevails, even though it depends on the subject matter when judges show reluctance. This approach seems to be used because of the notion of separation of powers. In principle, additional protection can only be offered by the legislature, not by the courts. The decision to refuse an authorization of adoption on the grounds that the claimant is homosexual can illustrate this situation. In this case, the administrative judge did not wish to anticipate a change in the legislation and on the contrary left it up to Members of Parliament to set new regulations that would correspond to how social mores were evolving. With its 1996 decision, the Council

of State opted for a cautious position.[60] In this regard, one should also consider the declaration made by the First President of the Court of Cassation in 2010, in which he asserted that the domestic judge "shall apply the domestic law according to the provisions of the Convention as interpreted by the ECtHR and, should this consistent interpretation be impossible, quite simply ignore the inconsistent rule, whether legal or regulatory, recent or old".[61]

16.c. Do national courts try to modify or limit the effect of the Court's judgments/decisions, e.g. by modifying the Court's interpretation to fit in as far as possible with the national legal system and the national legal traditions?

The examples given above show that the courts usually follow the Court's judgments quite carefully. Mostly, the different French jurisdictions do not try to modify or limit the effects of the ECtHR case. When the French system of custody appeared to have become inconsistent with the case law of the Court,[62] for example, the Constitutional Council hastened to declare several provisions of the French Criminal code contrary to the Constitution,[63] whereas the French legislator, sanctioned by the conventional authority which confirmed the declaration of unconstitutionality,[64] reformed the legislation (14 April 2011 Act) to ensure that a lawyer is present from the first hour of custody. The Court of Cassation, following in the footsteps of the declaration of the Constitutional Council, hastened to have the ECHR prevail over some criminal custody provisions. Indeed, in three cases of 19 October 2010, the criminal chamber of the Court of Cassation, ruling in Plenary Session,[65] considered that some current rules pertaining to custody did not comply with the requirements of Article 6 of the ECHR as interpreted by the European Court.

17. How do courts deal with the ECtHR's margin of appreciation doctrine?
17.a. Do they apply the margin of appreciation doctrine in the same way as is done by the ECtHR?
17.b. If so, do the courts make careful use of the doctrine, or do they sometimes opt for an overly narrow or overly wide margin of appreciation?

The Council of State in particular considers the margin of appreciation as a way of avoiding protectionist inconsistencies with the ECHR. Most of the time it confines itself to considering the provisions of the ECHR as well as the decisions of the ECtHR that help to solve the problem at the national level. Therefore, there is careful use of the margin of national appreciation doctrine in France.

18. How intensely do courts review legislation and/or administrative decisions on conformity with the ECHR? Do they always opt for marginal / deferential review (test for manifest violation) or can the scrutiny be more strict?

The case-law concerning the right of aliens is an illustrative example in this respect. Traditionally showing great reserve in its review, since the mid-70s the administrative courts have undertaken a review limited to manifest errors of appreciation, for instance a review of decisions taken on grounds

[60] Case of 9 October 1996, *Departement de Paris* v. *Fretté*, *Lebon* p. 390.
[61] G. Canivet, 'La Cour de cassation et la Convention européenne des droits de l'homme', in C. Teitgen-Colly ed., *Cinquantième anniversaire de la Convention européenne des droits de l'homme* (Nemesis-Bruylant 2002), p. 260.
[62] *Salduz* v. *Turkey*, ECtHR (GC) 27 November 2008, appl. no. 36391/02; *Dayanan* v. *Turkey*, ECtHR 13 October 2009, appl. no. 7377/03.
[63] Const. Council 30 July 2010 n° 2010-14/22), QPC.
[64] *Brusco* v. *France*, ECtHR 14 October 2010, appl. no. 1466/07.
[65] That is to say, in French, *arrêt d'Assemblée*, which means a decision taken by the whole institution.

of public policy leading to the deportation of an alien.[66] The courts then undertook a full review of motives of decisions concerning aliens, by verifying, for example, proportionality between the violations of the alien's family life brought about by police measures and the public interests that motivate these measures, in order to give full effect to the provisions of Article 8 of the ECHR.[67] This precedent has been extended, without following a European demand, by the generalisation of a normal review of immigration policing.[68] This change can be explained by the initial reticence of the administrative judge to take account of the case law of the ECtHR and the recent change by the end of the 90s. It can also be explained in terms of the will of judges to reinforce human rights guarantees in a field particularly subject in recent years to tough political measures.

18.a. If strict scrutiny is possible, which standards or factors determine the intensity of the courts' review?

Proportionality review is enforced by the judicial judge, whether it is in the criminal or the civil domain. In applying the specific provisions of aliens' rights, for example, a court of appeal was sanctioned for ignoring "provisions of Article 8 of the ECHR even though, on hearing a request for a sentence of a permanent ban from the French territory made by a claimant invoking the right to respect for private and family life to be overturned, the court did not check to see whether upholding the measure in question respected an appropriate balance between the right mentioned and the requirements of Article 8.2 of the aforesaid Convention".[69]

The Council of State mobilises the special features of collective treaty provisions as they are interpreted by the European Court in order to define the scope and the degree of intensity of its own review. A judgment of 26 October 2007 in the case of *Association de défense contre les nuisances aériennes* clearly bears testimony to this, on two scores. First because the Council of State, after having hesitated to adjudicate distinctly, applies Article 8 of the Convention as far as environmental protection is concerned, following a particularly extensive interpretation by the ECtHR, which includes the right to live in a healthy environment within the scope of the right to a private and family life. Secondly because the Council shows concern to adapt its review to that carried out by the ECtHR, which conducted a review of the balance of measures taken or refused in the field of environmental protection. Renouncing an asymmetric review (i.e. a control which would not be the same as that applied by the ECtHR), practiced until now on use or non-use of the power of the special police force of the administrative authority to restrict airport use, the Council of State, on the same lines as the European precedents, chose a normal review which led it to appreciate "the right balance between the people's right for a private and family life and the interests - particularly economic interests - linked to nocturnal activities of an airport".

It is also the conventional requirement for an "unlimited jurisdiction" review, stated by the ECtHR under "the right to a [...] tribunal", that encourages the Council of State, as part of an action in *ultra vires*, to practice an intensive test of proportionality on professional sanctions imposed by an administrative authority, that are bought in civil matters under Article 6.

The Court's point of view only starts to prevail when there is a difference of interpretation with the domestic judge. As soon as a proportionality review is implemented there can be different judgments. For the French lawyer, the field of divergence has been whether a legislative validation was justified by "overriding reasons in the general interest" with regard to the Convention or by "suffi-

[66] CE 3 February 1975, *Min de l'Int.* v. *Pardov*, *Rec.* p. 83.
[67] CE 19 April 1991, *Mme Babas*, *Rec.* p. 162 and CE Ass. 19 April 1991, *Belgacem*, *Rec.* p. 152.
[68] CE sect. 17 October 2003, *Bouhsane*, *Rec.* p. 413.
[69] Crim. 25th May 2005, pourvoi n° 04-85.180.

cient general interest" on a constitutional level. In such cases, the Court's judgment has ended by prevailing. But, as opposed to the criterion laid down by the ECtHR, for a long time the Constitutional Council has contented itself with "reasons of public interest", in this sense being less demanding than the Court of Human Rights, while applying a review on a manifest error of assessment.

Thus, it may be concluded that strict review of proportionality is usually only applied if the case law of the ECtHR forms a sufficient basis for it.

18.b. If the courts can only find a violation of the Convention if it is manifest, it is conceivable that less manifest violations are accepted (so it is conceivable that the ECtHR would still find a violation if it had to decide on the case). If that were to occur, do you think the courts would accept this or would the courts then have recourse to other means to avoid a conflict with the Convention?

Not applicable in France.

19. Do the courts make use of special interpretative techniques used by the ECtHR, such as evolutive interpretation (interpretation 'in the light of present day conditions') or consensus interpretation? If so, can you estimate if they do so standardly / frequently / sometimes / rarely?

Judges do what French doctrine sometimes calls the "constructive interpretation".[70] Frédéric Sudre defined it thus: "The domestic judge does not hesitate to give a constructive interpretation of the provisions of the Convention, using the potential offered by the conventional instrument dynamically in its conventionality review. […] The judge can do this in two ways. Either the domestic judge makes an extensive interpretation which leads him/her beyond the European interpretation, and one will consider that the judge carries on a dialogue with the European Court. Or the domestic judge gives an innovative interpretation in the absence of European precedents, and one will consider that the judge is thereby starting a dialogue with the European Court, who may or may not respond."[71] However, the courts sometimes prefer to use 'classical' methods of interpretation, such as teleological or historical interpretation. They also base a novel interpretation on a simple reference to a judgment of the ECtHR.[72]

20. Is the role and position of the ECtHR debated in your country? If so:
20.a. Where is the criticism mainly visible (media, politics, scholarship, court room)?
20.b. What kind of criticism is usually voiced (complaints about expansion of scope; quality of judgments; independence and impartiality of judges; disrespect for national sovereignty; insufficient knowledge of national law; etc)?
20.c. If there is any criticism, is this a new development? When did the criticism first become apparent? Can you explain what gave rise to the criticism?
20.d. Does the criticism affect the status of the ECHR and the ECtHR's judgments/decisions in judicial decision making? If so, what concrete effects does this have (e.g. more frequent references to the margin of appreciation doctrine, more references to national constitutional law,

[70] In French, known as the "interprétation constructive".
[71] F. Sudre, 'Convention européenne des droits de l'hommes et droit interne : primauté et effet direct', in L.E. Pettiti *et al.*, *La Convention européenne des droits de l'homme* (Némésis 1992), p. 14.
[72] Ch. Com Court of Cassation 12 July 2004, n° 01-11403, *Bull. Civ.*, IV, n° 153, p. 167; CE 25 May 2007, *Courty*, *AJDA* 2007, 1424, concl. R. Keller

restrictive interpretation of ECtHR judgments/decisions, disapplying the ECHR in favour of national (constitutional) law)?

Some judges of the Council of State have been mildly critical of the meaning given to the *res interpretata* authority. The "judges' dialogue" (*dialogue des juges*) introduced by President Bruno Genevois[73] regarding relations between domestic courts and the European Court of Justice, has spread to relations with the ECtHR and the Constitutional Council. This reveals the extent to which any existing criticism is marginal. Moreover, it makes it clear that such criticism is not only addressed to the ECtHR, but also to Supreme Courts in general. The clearest criticism was offered by Ronny Abraham in his conclusions as the government commissioner in the Bitouzet case,[74] but it remains isolated and circumstantial.

21. Are there any intentions at the political level to amend the constitution or legislation in order to change the courts' competences in relation to the interpretation and application of the ECHR?

No. On the contrary, the QPC vastly extends the application of the ECHR to the Council, more precisely Article 6 § 1. This was not the main intention, but it is essential: the application of the ECHR is reinforced.

Since the late 1980s, the Strasbourg Court has progressively applied Article 6 to procedures before constitutional courts, initially in relation to the requirement of a reasonable time frame, then in relation to other guarantees of a fair trial. This applicability was established in the *Ruiz-Mateos* v. *Spain* case of 23 June 1993 concerning a request for a preliminary ruling. Until now this case law has not been applicable to the Constitutional Council. On the one hand, the question of the application of Article 6 § 1 does not arise for the *a priori* and abstract review of constitutionality that the Constitutional Council carries out before the publication of acts. Indeed, there are no "civil disputes", nor "parties."On the other hand, the Strasbourg Court considered that the Constitutional Council is not subject to its control when the latter rules as an electoral judge. This analysis has been repeated with the adoption of the QPC and Article 61-1 of the Constitution which was passed in 2008 and entered into force in 2010.The Constitutional Council established rules that are directly inspired by the case law of the Strasbourg Court: for the reasonable time frame, impartiality, right of access, equality of arms and public hearings. For instance, concerning the reasonable time frame, the legislator tried to protect the QPC from criticism for taking an unreasonable amount of time. The judge *a quo* shall rule "without delay" on a QPC (Section 23-2 of the institutional ordinance of 7 November 1958). The Council of State and the Court of Cassation shall rule on a QPC within three months (Sections 23-4 and 23-5). After that time, the QPC "shall be transmitted to the Constitutional Council" (Section 23-7). Finally the Constitutional Council shall give its ruling within three months (Section 23-10). All these periods, at all stages of the proceedings, are of course in conformity with Article 6 § 1 of the ECHR.

PART 4 – Access to information and judgments

22. To what extent do national judges have access to and knowledge of the ECHR and the case law of the ECtHR?

The ECHR is integrated into domestic codes, especially the Code of Criminal Procedure.

The case law of the ECtHR is published in the bi-monthly Bulletin of the Court of Cassation which

[73] President of the Council of State from 1999-2006.
[74] CE Sect. 3 July 1998, *Bitouzet*, *RFDA* 1998, p.1243, concl. R. Abraham.

is sent to all judicial judges. The case law is, of course, published and commented upon in specialised law reviews.

For the Superior Court of the administrative order, there is a watching team within the Council of State's Documentation and Research Division[75] (European Law delegation) which publishes the main cases of the ECtHR.

22.a. Are judges trained to apply the ECHR, either in law schools or in professional training?

ECHR law is part of the program for the Administrative Court Consultant competitive examination (see Order of 28 September 2012 which lays down the program of the tests organised for the direct recruitment of judges in both administrative courts and administrative courts of appeal).

As part of continuing education (internships), training in European Human Rights law is still quite rare. Nonetheless, when any such training does exist, it is excellent. A good example is the training program run by the French National School of the Magistracy (ENM): this is attended by judicial judges in office, and is called "the ECHR: instructions for use."

There is no precise training in the direct application of the ECHR at the ENM, whereas the question of European Union law is thoroughly covered. Nevertheless, the ENM ensures its future judges are given thorough initial training in this, and offers a national continuing training session on the subject at least once a year. It is compulsory for all judges who are still in training to follow this course.

Teaching concerning European Human Rights law is essentially provided in law faculties.

22.b. How is information about the judgments/decisions of the ECtHR made available to the courts?

- Publication of doctrinal comments in French legal journals (*AJDA*, *RFDA*, *RFDC*, *Dalloz*, etc.); access to the decisions of the ECtHR *via* Internet. No paper version, except in the libraries of law faculties.
- According to the courts, the documentation department may or may not send an e-mail alert. In first-instance courts, access to decisions *via* internet is sometimes difficult for want of adequate equipment or easy internet access. First-instance judges deplore that they have no training in efficient research on European Human Rights law.
- Some articles about the case law of the ECtHR are published on the website of the Ministry of Justice, but with very little information.
- The Website of the Court of Cassation offers an overview of the most important cases of the ECtHR every two months. See for example: http://www.courdecassation.fr/publications_cour_26/publications_observatoire_droit_europeen_2185/.
- A look at the decisions recently issued by France's Courts of Appeal and gathered in the *Jurica* database, itself managed by the French Court of Cassation, also strongly confirms that the ECHR represents an important source for the case law of judicial judges. By facilitating access to the case law of the Courts of Appeal, *Jurica* contributes to the transmission of the Convention's principles, as each court can find concrete implementations of the principles contained in the legal texts, such as in the cases of the Court of Strasbourg.

22.c. Are important judgments/decisions of the ECtHR available in the national language, e.g. because the government provides translations?

[75] Section du rapport et des études du Conseil d'État.

Yes they are, but this is because French is one of the official languages of the ECHR. This is all the more important given that relatively few judges have an expert knowledge of foreign languages. For those judgments which are now only published in English, that might be a problem.

22.d. Do you think there is an impact on the use of ECtHR judgments/decisions by national courts of the fact that they are usually only available in English and French?

For decisions of the ECtHR which can be found in French, this is not a problem for the different courts. For the other ones it might be a problem.

23. Are national judgments/decisions in which the ECHR plays a role available electronically?
Yes.

Are they translated into English?
No.

PART 5 – Concluding questions

24. To what extent do you think there is a connection between, on the one hand, the main features and characteristics of your constitutional system and the status of international law in the national legal system and, on the other hand, the impact of the ECHR and the judgments of the ECtHR on national case law?

The connection between the main features and characteristics of the French constitutional system and the status of international law is first of all due to the constitutional provisions which confirm the existence of a monist system with primacy of international law in the French legal order.

It is also due to the "steamroller effect" of the ECHR and the decisions of the Court: basically, sooner or later the European argument wins out and the courts give in.

French judges, although initially somewhat suspicious, today appear more willing to collaborate in what some, such as Laurence Burgorgue-Larsen, call the dialogue of judges. And all judges are concerned by this Europeanisation of the law.

With the QPC, the Constitutional Council is increasingly integrating European Human Rights law into its reasoning and decisions, so much so that it anticipates possible convictions of France in Strasbourg. Even if the ECHR is still not part of the block of constitutionality and still not considered an imperative norm with constitutional value, with the QPC, it is gradually becoming a persuasive element of this block.

25. How does the application of the ECHR in the case law of the states relate to the role of national fundamental rights (e.g. constitutional rights)?

The ECHR has undoubtedly helped to better guarantee human rights. In this regard too it can be said that there has been a Europeanisation of protection (European Law is now integrated into judges' reasoning, including that of the Constitutional Council). It can even be considered that European Human Rights law is implicitly placed on the same level as constitutional rules (cf. the latest analyses on the QPC). This law has become as important as the constitutional guarantee granted to fundamental rights thanks to the block of constitutionality, since it now forms an integral part of the constitutional judge's reasoning.

26. To what extent do you think that debates on the role of the ECtHR and its judgments have an impact on national case law?

In France, until now, debates have given preference to the ECHR and the ECtHR, in spite of a few marginal and isolated instances of Europhobic behaviour. And this tendency shows no sign of reversing at the time of writing.

27. Do you think there is any relation between the debate on the ECHR and the national constitutional system for implementating international law and if so, to what extent?

Monism with primacy of international law has undoubtedly played a role in favouring very extensive integration of the European judge's reasoning in French case law. One might think that European Human Rights law, implicitly placed on the same level as constitutional rules thanks to the mode of reasoning adopted by the Constitutional Council, may one day be explicitly incorporated into the block of constitutionality. The Constitutional Council is somewhat contradictory today: it interprets constitutional principles in the light of fundamental rights guaranteed by the ECHR, but refuses to widen the norms it refers to when carrying out a review of the Convention. The question that arises is therefore whether the Constitutional Council should not in future do explicitly what it has already done implicitly, that is, interpret the preamble of the Constitution in the light of the Convention.

GERMANY

Eckart Klein

PART I – The status of international law in the national Constitutional system

1. Can you briefly characterise your national Constitutional system? Please pay attention to matters such as:

- **Character of the state (monarchy, republic…)**
- **System of government (parliamentary, presidential…)**
- **Character of the Constitution (written, unwritten)**
- **System for and extent of separation of powers (both horizontal (*trias politica*), and vertical (federation vs. unitary state, decentralisation or devolution))**
- **Main sources of fundamental rights**

The Federal Republic of Germany (*Bundesrepublik Deutschland*) is characterized by its Constitution, the Basic Law (*Grundgesetz*) of 23 May 1949, as 'a democratic and social federal state' (Article 20, paragraph 1). Germany belongs to the type of parliamentary democracies based on the rule of law and separation of powers (Article 20, paragraphs 2 and 3). On the federal level the legislative power is exercised by the Federal Diet or Parliament (*Bundestag*) and the Federal Council (*Bundesrat*) through which the states (*Länder*) participate in the legislation and administration of the Federation and in matters concerning the European Union (Article 50). The Federal Government (*Bundesregierung*), chaired by the Federal Chancellor (*Bundeskanzler*), represents the executive power, the Chancellor determining the general guidelines of policy (Article 65). The federal and Land courts (*Bundesgerichte*, *Landesgerichte*) form the judiciary. Head of State is the Federal President (*Bundespräsident*), elected for five years by the Federal Convention (*Bundesversammlung*), consisting of the members of the Federal Parliament and an equal number of representatives elected by the parliaments of the Länder (*Landtag*). The Federal President is elected by a majority vote of all the members of the Federal Convention and can be re-elected only once (Article 54). Generally speaking, the President has only representative competencies.

The horizontal separation of powers is supplemented by a vertical separation resulting from the simultaneous existence of the Federation and the 16 Länder which themselves are organised according to the separation of powers principle, having a government (*Landesregierung*) and a parliament (*Landtag*).[1] Regarding the relationship between the Federation and the *Länder*, Article 30 Basic Law determines that the exercise of state powers and the discharge of state functions is a matter for the *Länder* except as otherwise provided or permitted by the Basic Law. Therefore the Basic Law thoroughly defines the legislative and administrative powers of the Federal State.[2] If the Federation is empowered to act, federal law takes precedence over Land law (Article 31 Basic Law), provided it is in conformity with the Federal Constitution.

While there is a rather clear distribution of powers based on matters of substance in the legislative and administrative field, the court system is organised quite differently. Although the judiciary, too, is

[1] While the Basic Law (Article 28, paragraph 1) prescribes the general legal principles for the Land constitutions, the details are autonomously regulated by the 16 Land Constitutions themselves.
[2] See particularly Articles 73 and 74 and Articles 83 to 91 Basic Law.

composed of organs of the Länder and the Federation, the courts' competencies within the several branches are not divided on the line of subject matters, but the Länder courts always form the lower courts while the federal courts are established as supreme courts of ordinary, administrative, financial, labour, and social jurisdiction (Article 95, paragraph 1, Basic Law).[3] The Federation and all the Länder have their own constitutional court. The Federal Constitutional Court (FCC; *Bundesverfassungsgericht*) performs its duties according to the powers assigned to it by the Basic Law or other federal laws, especially the Law on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*).[4] The competencies of this Court are very broad.[5] They comprise, inter alia, abstract and concrete norm controls, disputes between the Federation and the Länder and between the Länder themselves, disputes between federal organs, prohibitions of political parties and forfeiture of basic rights. Of particular importance is the constitutional complaint procedure (*Verfassungsbeschwerde*), enabling any person who claims that one of his or her constitutional basic rights has been violated by a public authority, including the legislative power, to lodge a complaint of unconstitutionality with the Federal Constitutional Court. More than 96% of all procedures coming before this Court involve such individual complaints, which emphasises the general awareness of the importance of basic rights protection in Germany.[6] The constitutional courts of the Länder are entitled by the Land constitution or other Land law.[7] According to these rules only some of them have the power to decide on individual constitutional complaints relating to alleged violations of basic rights protected under the Land constitution. A Land constitutional court can never decide on a violation of a basic right contained in the Basic Law. On the other hand, it is possible that an individual may claim that a decision of a Land constitutional court is violating the (perhaps quite similarly framed) fundamental right of the Basic Law and lodge a complaint with the Federal Constitutional Court.[8]

The Basic Law and most Land constitutions contain quite comprehensive catalogues of fundamental rights. The catalogue on the federal level is quite similar to that of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention, ECHR), both of them originating from the immediate post-war period and clearly influenced by the Universal Declaration of Human Rights, adopted by the UN General Assembly in December 1948. Unlike the Basic Law which, apart from very few exceptions, focuses on civil and political rights, many Land constitutions also enshrine economic, social and cultural rights. As long as those rights are in conformity with federal law they remain in force (Article 142 Basic Law).

The list of rights contained in the Basic Law starts with the proclamation of the inviolability of human dignity and the obligation of all state authority to respect and protect it (Article 1, paragraph 1). According to Article 1, paragraph 2, '(t)he German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world', and paragraph 3 of the same provision provides that the 'following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law'. The clear and strong accent put on the recognition of basic human rights is certainly a direct response to the complete disrespect of individual rights during the period of Nazi rule in Germany between 1933 and 1945. Article 2 of the Basic Law

[3] Federal Court of Justice (*Bundesgerichtshof*), Federal Administrative Court (*Bundesverwaltungsgericht*), Federal Finance Court (*Bundesfinanzhof*), Federal Labour Court (*Bundesarbeitsgericht*), Federal Social Court (*Bundessozialgericht*).
[4] The Law dates from 1951, but has been often amended.
[5] A full and detailed account of all the powers of the Federal Constitutional Court is given by E. Benda, E. Klein and O. Klein, *Verfassungsprozessrecht*, 3d ed. (Heidelberg, C.F. Müller 2012).
[6] Ibid., p. 597. From 1951 to 2010 188,810 cases were brought before the Court, of which 96.47 % were individual complaints. However, the success rate is lower than 5 %.
[7] A detailed review is presented by C. Pestalozza, *Verfassungsprozessrecht*, 3rd edn. (München, C.H. Beck 1991) p. 372 et seq.
[8] Sometimes very difficult issues arise in this context; for a more detailed discussion see Benda and Klein, *supra* n. 5, pp. 18-29 and *infra* the answer to question 2.b.

generally guarantees the right to personal development, the right to life and personal integrity. Article 3 contains the equality and non-discrimination clauses. The following articles enumerate the classic freedom rights as, for example, freedom of religion, faith and conscience, of expression and information, assembly, association, correspondence, movement, privacy, property etc.[9] The basic rights usually entitle as subjective rights all individuals, thus not distinguishing between German nationals and aliens. Some rights, however, are restricted to Germans, namely the rights to assemble peacefully, to form corporations and other associations, to move freely throughout the federal territory, and to choose any occupation and profession.[10] Actually, this does not exclude non-nationals from the enjoyment of these rights, as they may claim the general right to the free development of their personality (Article 2, paragraph 1), which also entitles them to lodg a constitutional complaint to the Federal Constitutional Court.[11] Further, according to legislative provisions, aliens enjoy all the rights which are reserved to German nationals on the basis of the Constitution. Apart from this, because of the prohibition of discrimination on the ground of nationality (Article 18 of the Treaty on the Functioning of the European Union, TFEU), all nationals of other States belonging to the European Union must not be treated differently in the enjoyment of the rights, with the sole exception of the right to vote (Article 38 Basic Law). Even here, on the basis of European Law, other EU citizens have the right to vote at the county and municipal level.[12]

2. a. To what extent are the national courts (and/or non-judicial bodies, such as Councils of State) empowered to review the compatibility of acts of parliament and other legislation with the Constitution?

As all the German courts are bound by law and justice (Article 20, paragraph 3, Basic Law) they have to respect the hierarchy of norms established by the Constitution. Applying a legal norm that is not compatible with the Constitution would violate their obligation to respect the rule of law. Thus every court has to examine the constitutionality of the rules applicable to the case at issue, but usually the courts are not empowered to decide on the question of unconstitutionality. When an ordinary court finds that a legal provision is unconstitutional, there are two cases to be distinguished: If an act of parliament (federal or Land) is concerned, the court has to ask for a preliminary binding ruling from the Federal Constitutional Court, if a violation of the Basic Law is at stake; or, if a Land statute is concerned, the ruling must come from the constitutional court of the Land whose constitution is supposed to be violated.[13] In these cases only the Federal or the Land constitutional court has the power to declare the relevant legal norm null and void. If, however, the legal provision that is supposed to violate a constitutional rule has a lower rank in the hierarchy of norms than a formal parliamentary statute, e.g. a regulation or statutory instrument, then the ordinary courts have the competence to decide the case without taking the incriminated rule into account; they do not, however, have the power to declare the provision null and void, but just not to apply it. Only under specific circumstances may the Higher Administrative Courts (*Oberverwaltungsgerichte*) decide on the validity of certain statutory rules.[14]

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[9] The basic rights are contained in Articles 1 to 19, 20 § 4, 33, 38, 101, 103 and 104 Basic Law.
[10] Articles 8, 9, 11 and 12 Basic Law.
[11] J. Gundel, 'Der grundrechtliche Status der Ausländer', in J. Isensee and P. Kirchhof, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. IX, 3rd edn. (Heidelberg, C.F. Müller 2011) p. 843 at p. 846-7.
[12] Article 28, paragraph 1, Basic Law.
[13] Article 100, paragraph 1, Basic Law regarding the concrete norm control procedure; analogous provisions are found in the Land constitutions.
[14] See Section 47 Code of Procedure for Administrative Courts (*Verwaltungsgerichtsordnung*) of 19 March 1991, Federal Gazette (*Bundesgesetzblatt*) Part I p. 686.

Besides the concrete norm control procedure initiated by courts, the Federal Constitutional Court may also be addressed by other applicants to consider the conformity of a legal provision with the Basic Law. Thus, in the event of disagreement or doubts concerning the formal or substantive compatibility of federal law or land law with the Basic Law, or compatibility of Land law with other federal law, the Federal Government, a Land government or one quarter of the members of the Federal Parliament may apply to the Court in the abstract norm control procedure.[15] Individuals, too, by means of the constitutional complaint procedure, may also claim that any legal norm is violating their basic rights under the Basic Law. However, this is only possible when the applicant has exhausted all the existing remedies, and the norm is directly and presently of concern to the applicant himself.[16]

b. If they are competent to do so, what system of Constitutional review is used, i.e.:

- **A system of concentrated review (with a Constitutional Court having the final say on the interpretation of the Constitution)**
- **A decentralised system (where all courts have the power to decide on the constitutionality of acts of Parliament)**
- **Anything in between?**

The German system of constitutional review can clearly be featured as a concentrated review as far as formal acts of Parliament are concerned. Moreover, this concentration embraces all constitutional courts (16 Land, 1 federal). As has just been pointed out, if a federal law is at stake, only the Federal Constitutional Court is competent to rule on its constitutionality. On the other hand, it depends on the constitution (Land or Federal) allegedly to be violated whether a Land constitutional court or the Federal Constitutional Court is competent to rule on the validity of a law of a Land. If a Land provision is said to violate the Basic Law and, at the same time, also a Land constitution, the courts (in the case of the concrete norm control procedure), an entitled State organ (in the case of the abstract norm control procedure) or the individual applicant (in the case of the constitutional complaint procedure) have the right to choose whether they will bring the case before the Federal Constitutional Court or the Land constitutional court. The Federal Constitutional Court may not use the Land constitution, nor may the Land constitutional court use the Basic Law as a yardstick. If the Land constitutional court does not find a violation of the Land constitution, it is still possible for the case to be brought before the Federal Constitutional Court, which may find a violation of the Basic Law. If the Land constitutional court has found that the Land law violates the Land constitution, the law will be declared null and void and there would be no reason to further examine the law against the background of the Basic Law. Similarly, if a violation of the Basic Law has been rightly alleged and the Federal Constitutional Court therefore declares the Land law null and void, any further examination against the yardstick of the Land constitution would be without basis.[17]

Concerning legal norms beneath the level of formal acts of parliament the constitutional courts, if the case is brought before them, retain the power to declare their unconstitutionality, even if the ordinary courts are competent to leave aside those norms which they hold to violate a higher norm.[18] Again, as Land constitutional courts are only competent to examine Land law against their own (Land) constitution, they may only consider whether a Land norm having a lower rank is in violation of the Land constitution. Federal norms beneath the Basic Law can only be declared null and void by the Federal Constitutional Court, not a Land constitutional court.

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[15] Article 93, paragraph 1 No. 2, Basic Law.
[16] Article 93, paragraph 1 No. 4a, Basic Law; Section 90, paragraph 2, Law on the FCC.
[17] See *supra* the answer to question 1.b.
[18] See *supra* the answer to question 2.a.

c. If they are competent to do so, is there:

- **A system of *a priori* review, i.e. review of compatibility before an act is adopted by Parliament (e.g. advice by the Council of State)**
- **A system of *ex post* review**

If so, what kinds of procedures are in place?

- **Abstract and/or concrete control of norms by direct appeal?**
- **Abstract or concrete control of norms by means of preliminary questions?**
- **A combination of *a priori* and *ex post* review?**

The opportunity for constitutional review arises in principle with the coming into existence of a legal provision. Thus a federal act of parliament exists when it is promulgated, i.e. when it is signed into law by the Federal President and published in the Federal Law Gazette (*Bundesgesetzblatt*).[19] The entry into force is not essential for this purpose, since the relevant date is part of the content of the law and may be reviewed as such.[20] According to the jurisprudence of the FCC there is only one exception to the ex post review, and this concerns a federal statute by which the legislature consents to an international treaty.[21] In this case an a priori review is admissible, meaning that the review does not have to await the promulgation of the law, but may start immediately when the legislative procedure, including the participation of the Federal Council, has been concluded (Article 78 Basic Law). The reason for this is to avoid the situation that Germany might become internationally bound by the treaty before the Federal Constitutional Court has had the chance to examine the accepted obligations. This could easily happen, since the promulgation of the law and ratification of the treaty lie exclusively in the hands of the executive and can be done quite expeditiously. Thus Germany might run the risk of being constitutionally impeded from fulfilling its treaty obligations and therefore become internationally responsible under the rules on State responsibility.[22] The Federal Constitutional Court has held that it is indirectly in the service of the implementation of public international law, and thus by its work reducing the risk that Germany may violate its international commitments.[23]

As a court, the Federal Constitutional Court cannot become active *proprio motu*.[24] In all cases where any violation of the Constitution is alleged, the Court must become involved by an application from outside. Concerning legal provisions, admissible applicants in the case of an abstract norm control, are the Federal Government, a Land government or one fourth of the members of the Federal Parliament.[25] A concrete norm control, which can only be initiated by a court,[26] is practically conceivable only after the norm has entered into force, because it would not be applicable in a given case at an earlier stage. Individuals, too, through the constitutional complaint procedure, are also possible applicants if they themselves are directly concerned by the norm and may allege a violation of one of their own constitutionally protected basic rights.[27] Under such circumstances individuals may also lodge a constitutional complaint against a law approving an international treaty by way of an a priori

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[19] Article 82 BL.
[20] BVerfG 26 July 1972, BVerfGE 34, 9 (23); BVerfG 22 May 2001, BVerfGE 104, 23 (29).
[21] See Article 59, paragraph 2, Basic Law.
[22] See UN Doc. A/RES/56/83, Annex (28 January 2003): Responsibility of States for internationally wrongful acts.
[23] BVerfG 23 June 1981, BVerfGE 58, 1 (34); BVerfG 14 October 2004, BVerfGE 111, 307 (328); BVerfG 26 October 2004, BVerfGE 112, 1 (25). See also E. Klein, 'Die Völkerrechtsverantwortung des Bundesverfassungsgerichts – Bemerkungen zu Art. 100 Abs. 2 GG', in: H.-W. Arndt et al., eds., *Völkerrecht und deutsches Recht. Festschrift für Walter Rudolf* (München, C.H. Beck 2001), p. 293 at p. 294.
[24] Of course, the same is true for all other courts, including the Land constitutional courts.
[25] Article 93, paragraph 1, no. 2, Basic Law.
[26] Article 100, paragraph 1, Basic Law.
[27] Article 93, paragraph 1, no. 4a, Basic Law.

review.[28] In fact, nearly all treaties concerning the transfer of powers from the Member States to the EU since Maastricht have come under attack by individual applicants, usually claiming a substantial loss and therefore suffer a violation of their democratic right to vote (Article 38, paragraph 2, BL).[29] Also, following the abstract norm control procedure, a Land government or one quarter of the members of the Federal Parliament could ask the Federal Constitutional Court for its ruling prior to the promulgation of the federal statute permitting the ratification of the treaty.

3.a. Can you briefly characterise the status of international law (treaties, decisions/resolutions by international organisations, customary international law) in the Constitutional order? Do treaties, decisions/resolutions by international organisations and/or customary law form part of the law of the land?

The Basic Law contains specific rules regarding general rules of international law and international treaties. According to Article 25 cl. 1 Basic Law, general rules of international law, comprising customary law and general principles of law,[30] are an integral part of the national law.[31] Likewise, according to Article 59, paragraph 2 cl. 1, Basic Law, international treaties, including human rights treaties such as the European Convention on Human Rights or the International Covenant on Civil and Political Rights, to which the Federal Parliament has consented, are likewise held to be incorporated into the domestic legal order.[32]

Since the Basic Law itself does not determine how this incorporation operates, different opinions exist on this issue. Formerly this incorporation or adoption process with regard to the general rules of international law and international treaties was interpreted as one of transformation, meaning that the international norm, on the basis of Article 25 itself or on the basis of the federal statute consenting to the treaty according to Art. 59, paragraph 2, Basic Law, passed into a national norm (of course without losing its international nature on the international plane). Thus being part of domestic law, general rules of international law and treaties had naturally to be applied by all State organs (*Transformationstheorie*).

Nowadays,[33] incorporation is rather understood as being based on an order for the application of the international norms automatically given by the Basic Law itself (Article 25) or the federal statute (Article 59, paragraph 2). However, this theory (*Vollzugslehre*[34]) can only be applied if the international norm itself is willing and able (meaning that it is sufficiently clear for direct application) to produce immediate legal effects. Otherwise the norm has to be implemented by an applicable national norm.

Apart from this situation, it is rather a theoretical question whether international norms are transformed into domestic law or an order of national application is given to the international norm. In the latter case the norm retains its international nature, i.e. it is applied as an international legal rule within the domestic legal order. The advantage of this view is that the rules of treaty interpretation

[28] *Supra* n. 19.
[29] See, e.g., BVerfG 12 October 1993, BVerfGE 89, 155 (*Maastricht*); BVerfG 20 June 2009, BVerfGE 123, 267 (*Lisbon*).
[30] Cf. Article 38, paragraph 1, of the Statute of the International Court of Justice.
[31] Art. 100, paragraph 2, BL: 'If, in the course of litigation, doubt exists whether a rule of international law is an integral part of the federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court'.
[32] The ECHR does not itself order its incorporation into domestic law, even not on the basis of its Article 13; see *James and Others* v. *United Kingdom*, ECtHR 21 February 1986, appl. no. 8793/79; contra, based on Article 31, paragraph 3 (b), Vienna Convention on the Law of Treaties of 1969, J.M. Hoffmann, 'Die Pflicht der Staaten zur Übernahme der Rechte der Europäischen Menschenrechtskonvention in das innerstaatliche Recht', 16 *MenschenRechtsMagazin der Universität Potsdam* (2011) at p. 131.
[33] This is today not only the prevailing opinion of lawyers, but also of the Federal Constitutional Court, see, e.g., BVerfG 13 December 1977, BVerfGE 46, 342 (363).
[34] Sometimes also called 'Anwendungsbefehlslehre'.

and the other rules provided in the Vienna Convention on the Law of Treaties of 1969 reflecting customary law can be used, and also the denunciation of the international treaty by Germany would automatically bring its internal application to an end. The *Vollzugslehre* is therefore generally more adequate for the explanation of the incorporation process. On the other hand, it must be observed that the same results, though through more sophisticated deliberations, can also be achieved if the transformation theory is applied.[35]

Concerning European law (EU law) the same method applies for the founding treaties (Article 59, paragraph 2, in conjunction with Article 24 Basic Law). If the wording of the treaty provisions is sufficiently clear, they can be directly applied.[36] Secondary law (regulations, directives, resolutions/decisions) becomes applicable according to the treaty rules. Regulations and decisions are directly applicable, directives require the creation of national legal provisions.[37]

In contrast to general international law and treaties, the Basic Law does not provide specific rules concerning emanations of international organizations other than the European Union to which sovereign powers may be transferred according to Article 24 Basic Law. This is true, for example, for binding as well as non-binding resolutions of the UN Security Council or other UN organs. In order to gain legal effect in national law the rules contained in the resolution must be transformed into national law, for example a Security Council resolution ordering sanctions according to Article 41 of the UN Charter. Actually, the Charter itself does not pretend to have immediate effect in the national sphere. As a general rule, public international law leaves the issue of how to comply with its rules to its subjects, notwithstanding existing international rules for non-compliance.

In principle, the same is true in relation to (internationally) binding and non-binding decisions of international courts or quasi-judicial bodies as treaty bodies. Judgments of the European Court of Human Rights (ECtHR) as such, whether immediately directed at Germany or another State, are not automatically incorporated into domestic law, but they obtain effect through the provisions of the Convention which they are interpreting and which are directly applicable.[38] In the same way, the legally non-binding views, concluding observations and general comments of the UN Human Rights Committee or other treaty bodies may also gain legal effect in the national legal order.[39]

3.b. If so, what rank do treaties, decisions/resolutions adopted by international organisations and/or customary international law have in the national hierarchy of norms? Is there some kind of hierarchy?

The hierarchy of norms is primarily characterised by the division between federal and Land law. Article 31 BL states that federal law shall take precedence over Land law. Since treaties approved by the legislature according to Article 59 BL as well as general rules of international law (Article 25 BL) form part of the federal law, they take precedence at any rate over the law of the Länder. Further,

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[35] See on the whole problem R. Geiger, *Grundgesetz und Völkerrecht*, 3d ed. (München, C.H. Beck 2010) p. 154-161; H. Steinberger, 'Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen', 48 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1988) p. 1 at p. 4.

[36] The European Court of Justice (CJEU), in its jurisprudence, has identified many treaty provisions which can (and must) be directly applied and even take direct effect, i.e. individuals are entitled to invoke them before the national law applying bodies, especially courts.

[37] Article 288 TFEU.

[38] See *infra* the answer to question 15.

[39] See more closely R. Uerpmann, 'Implementation of United Nations Human Rights Law by German Courts', 46 *German Yearbook of International Law* (2003) p. 87 at p. 94; A. Seibert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para. 2', 5 *Max Planck Yearbook of United Nations Law* (2001) p. 399 at p. 417 et seq.

international treaties, again including human rights treaties, have the rank of a federal act of Parliament (statute), and therefore trump all federal law below this rank.[40] This position makes them vulnerable in relation to later federal statutes (lex posterior rule), but there is a legal assumption, based on the principle of the Basic Law's friendliness or openness to international law (*Völkerrechtsfreundlichkeit*)[41], that the legislature does not wish to violate international obligations. Thus only in the case that it is impossible to interpret a later statute in conformity with the treaty provisions will the later rule prevail, which of course creates an internationally wrongful act, leading to international responsibility. General rules of international law have a rank between the Federal Constitution and a federal statute (Article 25 cl. 2 BL). They therefore take precedence over the latter, but not over the Basic Law.[42] No conflict in this respect has emerged as yet.

It is widely agreed that the Basic Law forms the top of the hierarchy of norms in Germany.[43] This view is only disputed as far as (secondary) EU law[44] is concerned which, according to the jurisprudence of the ECJ, prevails over any national norm, including the national constitutions.[45] The Federal Constitutional Court, at least in principle, still claims that the Basic Law shall prevail if the EU organs act outside their competences (*ultra vires*) or if the constitutional principles framing the identity of Germany are not respected.[46]

As judgments or decisions of international courts or bodies are not incorporated as such, they may only influence the interpretation of treaties and general international law whose position in domestic law has just been described (see above, answer to question 3.a).

[40] This opinion is based on Article 59, paragraph 2, BL. It is argued that the treaty cannot have a higher rank than the statute by which the Parliament consents to the treaty. This argument is disputed by some authors, e.g., N. Sternberg, *Der Rang von Menschenrechtsverträgen im deutschen Recht unter besonderer Berücksichtigung von Art. 1 Abs. 2 GG* (Berlin, Duncker & Humblot 1999) p. 219; T. Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten', in R. Grote and T. Marauhn, eds., *EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Tübingen, Mohr Siebeck 2006), p. 61 at p. 84 et seq. See also the references given by K. Mellech, *Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsprechung* (Tübingen, Mohr Siebeck 2012) p. 43-51.

[41] BVerfG 26 March 1957, BVerfGE 6, 309 (363); 111, 307 (317); 112, 1 (26); BVerfG 4 May 2011, BVerfGE 128, 326 (369). See further H. Sauer, 'Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur. Zur Bindung deutscher Gerichte an die Entscheidungen des Europäischen Gerichtshofs für Menschenrechte', 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) p. 35 at p. 46; A. Proelss, 'Der Grundsatz der völkerrechtsfreundlichen Auslergung im Lichte der Rechtsprechung des BVerfG', in H. Rensen and S. Brink, eds., *Linien der Rechtsprechung des Bundesverfassungsgerichts – erörtert von den wissenschaftlichen Mitarbeitern* (Berlin, De Gruyter Recht 2009), p. 553; F. Schorkopf, 'Völkerrechtsfreundlichkeit und Völkerrechtsskepsis in der Rechtsprechung des Bundesverfassungsgerichts', in T. Giegerich, ed., *Der 'offene Verfassungsstaat' des Grundgesetzes nach 60 Jahren* (Berlin, Duncker & Humblot 2010) p. 131.

[42] On the basis of the constitutional principle of openness to international law some argue in favour of an equal rank of the general rules of international law with the Basic Law and even some for a rank of international law higher than the Basic Law, but these opinions have not been accepted; see H. Steinberger, 'Allgemeine Regeln des Völkerrechts', in J. Isensee and P. Kirchhof, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VII (Heidelberg, C.F. Müller 1992) p. 525 at p. 551-558. Further BVerfGE 111, 307 (318).

[43] See only J.M. Hoffmann, Die Europäische Menschenrechtskonvention und nationales Recht. Ein Vergleich der Wirkungsweise in den Rechtsordnungen des Vereinigten Königreichs und der Bundesrepublik Deutschland (Köln, Carl Heymanns Verlag 2010) p. 113.

[44] The treaties establishing the EU are, as international treaties, subject to the scrutiny of the FCC.

[45] References are given by R. Streinz, *Europarecht*, 8th ed. (Heidelberg, C.F. Müller 2008) p. 75 et seq.

[46] Cf. BVerfGE 89, 155 (188); 123, 267 (332, 348, 353); BVerfG 6 July 2010, BVerfGE 126, 286 (302).

3.c. If international law is not part of the law of the land, what guarantees are there that the state will comply with its international obligations under treaties, decisions/resolutions by international organisations, or customary international law?

Not all international norms or other emanations form part of the law of the land.[47] In this case, according to the constitutional principle of friendliness to international law, the state organs will strive to avoid violations of the international legal engagements. It should be noted, however, that not even a full incorporation of international norms will completely exclude the possibility of their violation, because the internal interpretation and application may be differently assessed by other States and/or international bodies. In this case the mechanisms provided by the treaty concerned, or customary law (responsibility of states), become applicable.

3.d. Do the competent courts apply treaties, decisions/resolutions adopted by international organisations and/or customary international law as such (i.e. as sources of international law) or are they transformed into sources of national law in the process of incorporation? Are there any differences in practical consequences between the different approaches? Or is this a mere academic question without practical consequences?

See the answer to question 3.a. above.

3.e. Would you characterise your Constitutional system as monist, dualist or a hybrid system? This question has nothing to do with priority, but only with status as such.

One may characterise the German system as moderately dualist. It is dualist, because a clear and principled distinction is made between the international and national legal order. It is a moderate dualist system, because the national law contains many precautions for incorporating international norms into the domestic legal order and to avoid possible differences or, if they should nevertheless occur, to overcome them.[48]

4. To what extent and how are the national courts empowered to review the compatibility of the Constitution, acts of Parliament, lower legislation, and other decisions taken by public authorities with treaties, decisions/resolutions adopted by international organisations and/or customary international law?
If they are:
4.a. Are all courts competent to do so (i.e. a decentralised system of judicial review) or is the competence limited to designated judicial bodies (e.g. a Constitutional court or the highest courts)?

Basically, international law is a suitable yardstick to review national law insofar as international law is applicable in the domestic legal order and has a higher legal status than the relevant national provision, but the specific judicial procedure also has to be taken into account. Being bound by the applicable law, every court has to examine whether an applicable norm is in conformity with a higher rule. If the norm in question is not a formal act of parliament but rather, e.g., a statutory instrument, the

[47] Since all general rules of international law are part of the domestic law according to Article 25 BL, be it on the basis of transformation or rather of the order of application, only treaty provisions or decisions of international organisations may not form part of the domestic law, as long as they need transformation or further legal elaboration.
[48] BVerfGE 111, 307 (318). For the theory of moderate dualism see W. Rudolf, *Völkerrecht und deutsches Recht* (Tübingen, Mohr Siebeck 1967) p. 135; E. Lambert Abdelgawad and A. Weber, 'The Reception Process in France and Germany', in H. Keller and A. Stone Sweet, eds., *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford, OUP 2008) p. 107 at p. 117.

court has to leave it aside if it contradicts the international norm having a higher rank (a treaty or customary rule). If the problematic norm is a parliamentary act (federal or Land statute), only the Federal Constitutional Court is competent to decide on its validity. Therefore, the ordinary court which has to decide a given case has to ask the Federal Constitutional Court for a preliminary ruling.[49] If a Land statute is concerned the whole federal law serves as a suitable yardstick (Article 31 Basic Law), meaning that treaty provisions, e.g. the European Convention or the International Covenant on Civil and Political Rights, and general rules of public international law can be used for the review. On the other hand, federal statutes cannot be directly measured against treaties because they have the same legal rank. However, the FCC has held that the ECHR exerts an influence on the interpretation of the fundamental rights of the Basic Law, thus elevating the Convention to an indirect yardstick for federal statutes (but not for constitutional provisions themselves).[50] The articles of the Convention may thus strengthen the confidence of individuals already established by the constitutional rights.[51] General rules of international law, which have a rank between the Constitution and federal statutes, can be used as legal yardsticks for such statutes, but not for provisions of the Basic Law. If, however, the FCC is concerned with an abstract norm control procedure, only the Constitution itself can be used as a yardstick with regard to federal law.[52]

Decisions of international organisations and bodies as such are no suitable yardsticks. They may, however, influence the interpretation of the applicable international norm and thus become indirectly important in the review process. An exception has to be made, however, as to EU law.[53]

b. Are the courts competent to give priority to international law if national law conflicts with treaties, decisions/resolutions adopted by international organisations and/or international customary law? If so:

- **Is this competence based on national (Constitutional) law? Or is it inferred from the nature of international law (e.g. the nature of self-executing treaties or the principle of *pacta sunt servanda*)?**
- **Which formal competences do the courts have to give such priority (e.g. disapplying national law in the case at issue, declaring national law null and void)?**
- **Is there a difference between priority over legislation/acts of Parliament and priority over the Constitution?**
- **Does declaring an act null and void have *ex tunc* effect or *ex nunc* effect, or is it possible for the court to set a time limit for the legislature to make amendments before the act loses its legal effect?**

The review power is based solely on constitutional law which assigns specific competencies to the (ordinary and/or constitutional) courts by determining the possible applicants, suitable objects for review and the applicable yardstick. It likewise depends on domestic law (laws of procedure) whether a court may invalidate a norm because of its violation of another (higher) norm or must not apply it in the case at issue or has to ask for a preliminary ruling. If the FCC (in the cases described above, 4.a) holds that a national norm violates an international norm, the Court as a general rule would declare it null and void.

[49] Concrete norm control procedure, Article 100, paragraph 1, BL. See further E. Klein in: Benda and Klein, *supra* n 5, at p. 359.
[50] BVerfGE 74, 358 (370); 111, 307 (317).
[51] BVerfG 8 June 2011, BVerfGE 129, 37 (46).
[52] Art. 93, paragraph 1, no. 2, BL; Klein, *supra* n. 49, p. 289.
[53] *Supra* n. 45.

As a general rule, the invalidation of a legal norm takes effect *ex tunc*, i.e. back to the beginning of its existence. The Federal Constitutional Court may, however, under certain circumstances request the Parliament to replace the inflicted norm by a new one reflecting the legal requirements within a certain period of time and order the continuing applicability of the norm for the intervening period of time,. The Court is also empowered to determine new applicable rules for a transition period.[54]

5. Can parliament and/or the government play a role in determining whether an act of parliament which has been already been enacted and entered into force is compatible with the constitution and/or international law?

The Federal Government, a Land government or one quarter of the members of the Federal Parliament are able to initiate an abstract control procedure before the Federal Constitutional Courts.[55] As applicants they can always try to submit their opinion to the Federal Constitutional Court in written and oral statements. Even if they are not applicants themselves, the Court has to give them as well as the Federal Council the opportunity to submit their statements relating to the case.[56] The same is true concerning the constitutional complaint procedure, if the complaint is directly or indirectly lodged against a federal law.[57] In the concrete norm control procedure, too, these state organs also have to be heard, and they may even join the proceedings at any stage.[58] If the FCC has to take a decision on the issue whether a rule of general international law does exist (Article 100, paragraph 2, Basic Law), again the Federal Parliament, the Federal Council and the Federal Government have the opportunity to comment on the issue. They are further entitled to join the proceedings at any stage.[59]

PART 2 – Competences and techniques of national courts to apply the ECHR

6.a. Do all the substantive provisions of the ECHR (including the various substantive protocols) have direct effect, i.e. are they self-executing/directly applicable?

As all substantial provisions of the European Convention on Human Rights are framed in a way that they can be directly applied and such an application also corresponds with the clear intention of the Convention, all the necessary requirements are met to understand the law by which the national legislature consents to the treaty (Article 59, paragraph 2 clause 1, Basic Law) as an order for direct application of the treaty within the German legal order.[60] Hence it follows that the courts have to apply the provisions in all appropriate cases.[61] It should nevertheless be noted that some provisions expressly or implicitly relate to necessary domestic rules. Thus, e.g., Article 12 (right to marry) refers 'to the national laws governing the exercise of this right'. Article 2 (right to education) of the First Protocol presupposes institutions for education (schools), and Article 3 (right to free elections) of this Protocol requires the establishment of a parliamentary body and appropriate election laws. In all these cases the provisions of the ECHR do not replace domestic rules that may possibly be lacking, since they must always be created by the national legislature; the Federal Constitutional Court, on

[54] See Klein, *supra* n. 49, p. 543 and 592 et seq.
[55] An analogous procedure exists under the Land constitutions, enabling the Land Government and a certain number of members of the Land parliament to bring such an application to the Land constitutional court.
[56] Sections 77 and 82 Law on the FCC.
[57] Section 94, paragraph 4, Law on the FCC.
[58] Section 82 Law on the FCC.
[59] Section 83, paragraph 2, Law on the FCC.
[60] See *supra* question 3.a.
[61] See *supra* question 2.a.

the basis of the constitutional basic rights read in the light of the ECHR provisions, would have to find a violation of the Basic Law and, indirectly, the Convention.[62]

Article 13 (right to effective remedy) ECHR can be similarly assessed. The norm is directly applicable, but it cannot replace the formal enactment of a statute necessary to immediately cease the violation by closing an existing gap in the domestic law.[63] It is the national legislature which has become active. On the other hand, Article 5, paragraph 5, ECHR (enforceable right to compensation) presents an immediate legal basis for a compensation claim, even if corresponding national rules do not exist.[64] If domestic rules exist, they are to be interpreted in the light of Article 5, paragraph 5, ECHR meaning that these rules are applied by analogy.[65] Consequently there will be usually no need for the ECtHR to afford just satisfaction according to Article 41 ECHR in this respect, but the possibility cannot be categorically excluded.[66]

6.b. To the extent that the substantive provisions of the ECHR and its Protocols are considered to be self-executing / directly applicable / have direct effect, does this ipso facto mean that these provisions result in subjective rights enforceable before the national courts? Or are there any substantive provisions that are considered to be self-executing, but may not result in subjective rights? If so, please give examples.

All the directly applicable rights can be invoked by individuals as holders of the rights. The Convention rights are therefore not only part of the objective law, but subjective rights whose protection can be claimed against everybody who is obliged by these rights, particularly public authorities like administrative bodies and courts.[67] The judiciary is bound "by law and justice" (Article 20, paragraph 3, Basic Law), the ECHR being part of the applicable law.

6.c. If some of the substantive provisions of the ECHR and its Protocols are considered to be of such a nature that they can only be implemented by means of legislative measures, are the national courts nevertheless competent to apply those provisions to establish state responsibility in cases where those provisions have been violated?
If so, which remedies are possible? E.g.:

1. **Are the national courts competent to order the state or its bodies to compensate the damage caused by violations of non-self-executing provisions of the ECHR and its Protocols?**
2. **Are the national courts competent to order the State to adopt (legislative) measures which are necessary to implement non-self-executing provisions of the ECHR and its protocols?**

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[62] As to the possible consequences of such a finding see *supra* question 4.c.
[63] *Sürmeli* v. *Germany*, ECtHR (GC) 8 June 2006, appl. no. 75529/01; M. Breuer, in U. Karpenstein and F.C. Mayer, eds., *EMRK. Konvention zum Schutz der Menschenrechte und Grundfreiheiten, Kommentar* (München, C.H. Beck 2012), p. 321 at p. 324; Giegerich, *supra* n. 40, p. 70.
[64] BGH 4 November 1950, BGHZ 45, 46; BGH 4.11.1950, BGHZ 45, 58; BGH 29 April 1993, BGHZ 122, 268: including compensation for immaterial damage; B. Elberling, in Karpenstein and Mayer, *supra* n. 63, p. 93 at p. 132.
[65] BGHZ 45, 58.
[66] *Neumeister v Austria*, ECtHR 7 May 1974, appl. no. 1936/63; for the enforceability of Article 41 judgments, see E. Klein and M. Breuer, in Soergel*, Kommentar zum Bürgerlichen Gesetzbuch*, Vol. 12, 13th ed. (Stuttgart, W. Kohlhammer 2005) p. 697 at p. 812.
[67] Of course, the legislature is also committed, but it should be noted that domestically the treaty obligations have an equal rank with federal statutes and that only the FCC could enforce the Convention articles against the legislature on the basis of parallel rights existing under the Basic Law.

As has already been stated, all substantial rights protected under the European Convention can be directly applied by and invoked before the courts. If it is necessary to enact (or amend) a law to terminate the violation of a Convention right (e.g., the creation of a new remedy in cases of undue length of judicial procedure or a new law regarding preventive detention for reasons of public security), the ordinary courts cannot order the Parliament to legislate. Only the Federal Constitutional Court may do this, requesting enactment within a certain period of time and reserving the competence for transitional regulation if the legislature does not comply with this order.[68] The Court would have to base this order on a violation of the Basic Law; a violation of the Convention would only suffice if it reflects a violation of the Constitution itself. Claims against the legislature for compensation are generally not admissible,[69] for two main reasons. First, the German compensation system is based essentially on the wrongful acts of office holders (*Amtsträger*), while members of Parliament have a mandate and do not hold an office. Second, even if it could be argued that members of Parliament have to perform duties of office (*Amt*), such duties would lack another requirement, namely that they are related to specific persons (*Drittbezogenheit*). Members of Parliament, however, have to fulfil their functions for the general good and not *vis-à-vis* certain individuals.[70]

7. The case law of the ECtHR includes (positive) obligations on national courts to apply the Convention in relations between private parties (i.e. in horizontal relationships). Courts must refrain from interpreting contractual obligations in violation of the ECHR (*Khurshid Mustafa & Tarzibachi*, *Pla & Puncernau*). When deciding on horizontal conflicts between rights (e.g. the right to freedom of expression and the right to respect for one's reputation) they have to take account of the ECHR, and sometimes they are required to interpret national law in a specific manner (e.g. family law cases should always be decided in concreto, taking the best interests of the child into account). Do the national courts indeed apply the relevant ECHR provisions (or the corresponding provisions of the incorporating act) to cases between private parties, in compliance with the case law of the ECtHR?

While many claims regarding the ECHR directly concern alleged violations by public authorities (administrative and criminal cases), conflicts between private parties may also fall within the ambit of the Convention, because these conflicts may arise and must be settled on the basis of legal rules interpreted and applied by (national) courts, thus involving public acts and authorities, too. In these cases the question arises whether the domestic law is in conformity with the Conventional requirements for respect and protection of fundamental rights and whether the courts have failed to interpret and apply the law in conformity with the articles of the Convention. Although the jurisprudence of the ECtHR does not disclose a direct horizontal effect of the Convention, its influence on the legal settlement of private conflicts has been established by the Court through its understanding of the rights containing not only so-called negative rights (*status negativus*) but also positive commitments obligating the States parties to protect the values contained in the ECHR.[71]

Considered in light of their protective requirements, the Convention rights as applicable rules may in fact play an important role in private legal disputes. Interesting areas of reference are labour law[72],

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[68] BVerfG 30 April 2003, BVerfGE 107, 395 (418).
[69] Exceptions exist for expropriations directly by law (Article 14, paragraph 3, BL) and for violations of EU law on the basis of the *Francovich* jurisprudence of the European Court of Justice; see A. Haratsch, C. Koenig, M. Pechstein, *Europarecht*, 8th ed. (Tübingen, Mohr Siebeck 2012) p. 277.
[70] See F. Ossenbühl, *Staatshaftungsrecht*, 5th ed. (München, C.H. Beck 1998) p. 105.
[71] See G. Ress, 'The Duty to Protect and to Ensure Human Rights under the European Convention on Human Rights, in E. Klein, ed., *The Duty to Protect and to Ensure Human Rights* (Berlin, Berlin Verlag 2000) p. 165-205.
[72] A. Nußberger, 'Auswirkungen der Rechtsprechung des Europäischen Gerichtshofs für die Menschenrechte auf das deutsche Arbeitsrecht', 65 *Recht der Arbeit* (2012) p. 270, with many references.

family law[73] and the right to privacy[74]. The legal situation of the domestic basic rights is very similar. These rights entitle the individuals, but do not obligate them; they do not have immediate horizontal effect (*unmittelbare Drittwirkung*). The fundamental rights, however, contain objective values which must be protected by the State authority as the addressee of the rights against interference from wherever it originates. Thus, indirectly, the constitutional rights take effect in horizontal relationships (*mittelbare Drittwirkung*).[75] This understanding also paves the way to taking account of the Convention rights in relations between private parties. This means that the values enshrined in the Convention rights have to be protected by all State authorities, including the courts, which have to interpret the norms that regulate private relationships in conformity with these values. In this sense the domestic courts apply the rights of the Convention (at least in principle in the interpretation of the ECtHR),[76] and very often do so, though they may fail to apply them correctly. In some cases the courts have even openly refused to take account of the ECHR (and the relevant jurisprudence of the ECtHR), arguing that the obligations arising from the Convention would be addressed only to the State (Germany) as such and not the courts. The Federal Constitutional Court, in its famous *Görgülü* judgment (2004), clearly rejected this untenable view and obliged the courts to apply the articles of the ECHR in compliance with the jurisprudence of the ECtHR.[77]

8.a. Are there examples of cases in which national legislation or national decisions have been set aside / declared null and void / disapplied because of a conflict with the ECHR? If so, can you estimate if this occurs frequently / sometimes / rarely?
8.b. If constitutional review is possible: can you estimate if the constitution is used more often / just as often / less often than the ECHR as a basis for holding that legislation or decisions do not comply with fundamental rights norms?

As the ECHR is not an admissible yardstick for federal statutes, they cannot be invalidated or set aside merely because of a violation of the Convention. But, as has been explained above,[78] the Federal Constitutional Court is interpreting the fundamental rights of the Basic Law in the light of the ECHR, thus trying, as far as possible, to harmonise both of them. Therefore, but only indirectly, the rights of the ECHR may have an invalidating effect. This has actually happened, for example, when the FCC declared unconstitutional several sections of the Criminal Code violating Articles 2, paragraph 2, cl.2 and Article 104, paragraph 1, Basic Law, on the basis of the ECtHR's finding that keeping the applicant in preventive detention (*Sicherungsverwahrung*) after having served his sentence, violates Article 5, paragraph 1, and Article 7, paragraph 1, ECHR.[79] The example shows that in fact the constitutional review plays the decisive role, but this does not mean that Convention rights are excluded from this process. Concerning Land law, which can be examined against federal law (and therefore against the ECHR having the same rank), a violation of the Convention would give the Federal Constitutional Court a good reason to declare it null and void, but as far as I can tell, no relevant case has come up at the time of writing.

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[73] See the famous case *Görgülü* v. *Germany*, ECtHR 26 February 2004, appl. no. 74969/01.
[74] *Von Hannover* v. *Germany (no. 1)*, ECtHR 24 June 2004, appl. no. 59320/00.
[75] For the problem of Drittwirkung see W. Rüfner, 'Grundrechtsadressaten', in J. Isensee and P. Kirchhof, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VII, 3d ed. (Heidelberg, C.F. Müller 2011) p. 793 at p. 823; H.-J. Papier, 'Drittwirkung', in D. Merten and H.-J. Papier, eds., *Handbuch der Grundrechte in Deutschland und Europa*, Vol. II (Heidelberg, C.F. Müller 2006) p. 1331 at 1342.
[76] See *infra* the answer to question 14.a.
[77] BVerfGE 111, 307 (317); E. Klein, 'Anmerkung', 59 *Juristenzeitung* (2004) p. 1176; see also *infra* the answer to question 14.a.
[78] *Supra*, answer to question 4.a.
[79] BVerfG 4 May 2011, BVerfGE 128, 326 (331); *M.* v. *Germany*, ECtHR 17 December 2009, appl. no. 19359/04. See also M. Andenas and E. Bjorge, 'Preventive Detention', 105 *American Journal of International Law* (2011) p. 768-774.

Administrative acts must comply with the applicable law, of which the ECHR is part. Therefore, the competent domestic administrative authorities and the courts (generally the administrative courts)[80] are obliged to examine whether these acts are in conformity with the Convention rights and, if not, to strike them down.[81] The Federal Administrative Court, for example, applies Article 3 (prohibition of torture) ECHR in cases regarding the expulsion or extradition of aliens.[82] The relevant domestic law itself refers to the provisions of the Convention.[83]

8.c. Are there any examples where the court has declined to use the competence to set aside national legislation / decisions in order to respect separation of powers (between the courts and the legislature or between courts and administrative bodies) or the sovereignty of parliament?

No examples are known of a court that has refused to use its competence to invalidate or set aside a norm or an administrative decision just to respect the separation of powers principle or the sovereignty of parliament (the latter principle is not recognised in Germany). Of course, the fact that only the Federal Constitutional Court (not the ordinary courts) is empowered to invalidate formal federal laws reflects the respect due to Parliament as the representation of the people, directly constituted by popular vote.

9. Are the national courts competent to order the national legislature to bring national law into conformity with the ECHR by means of amending or introducing legislation?

Only the Federal Constitutional Court may give binding orders to the national legislature, if the Basic Law necessitates legislative activity.[84] Since the Basic Law has to be understood in the light of the Convention, the FCC has interpreted the constitutional rights in the sense of the respective articles of the ECHR. In this way, the right to a fair procedure (Article 6 ECHR), apart from its direct applicability, has been connected with particular provisions of the Basic Law, Article 101 (right to the lawful judge), 103 (right to a hearing) and Article 97 (independence of judges) in conjunction with the State-of-law principle (constitutional state: *Rechtsstaatsprinzip*).[85] Thus through the text of the Basic Law (or rather the interpretation of its provisions by the FCC) the ECHR may become the reason for an order of the FCC to bring the law into conformity with Germany's international obligations. To give another example: the ECtHR has for quite a long time held that Germany is violating Article 6 ECHR because of the lack of effective remedy if judicial proceedings (including proceeding before the FCC) are unduly prolonged.[86] Nevertheless, for years the rather hesitant attempts by the legislature to improve the situation had achieved no positive results. By a resolution of the plenary of the FCC in 2010, strong pressure was exerted on Parliament[87], and the relevant statute finally entered into force on 24 November 2011.[88] Similarly, the FCC's judgment of 4 May 2011 cleared the way for a new

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[80] See Section 40 Administrative Court Procedure Act (*Verwaltungsgerichtsordnung*)
[81] Section 113, paragraph 1, Administrative Court Procedure Act; see also BVerfGE 111, 307 (325); Mellech, *supra* n. 40, p. 10.
[82] BVerwG 16 December 1999, BVerwGE 110, 203 (210); BVerwG 24 May 2000, BVerwGE 111, 223.
[83] Section 60, paragraph 5, Law on Residence of Aliens (*Aufenthaltsgesetz*) of 2004, Federal Gazette 2004 Part I p. 1950.
[84] See, e.g., Article 117 BL.
[85] BVerfG 3 June 1969, BVerfGE 26, 66 (71); BVerfG 3 June 1992,BVerfGE 86, 288 (317); BVerfG 8 June 2010, NJW 2011, 591 (592).
[86] See the *Sürmeli* case, *supra* n. 63. For the issue that the German compensation law does not present a remedy in the sense of Article 13 ECHR concerning undue delay cases see M. Breuer, *Staatshaftung für judikatives Unrecht* (Tübingen, Mohr Siebeck 2011) p. 328 et seq.
[87] Resolution of 10 March 2010 (unpublished).
[88] Federal Gazette 2011 Part I p. 2302.

law on preventive detention (*Sicherungsverwahrung*), after the ECtHR had found violations of Article 5 and 7 ECHR.[89]

10. Do national courts strive to interpret national law (including the national constitution) in harmony with the ECHR?

National courts are obliged to follow the rule of law, meaning they are obliged to apply the applicable law. Therefore the rights of the Convention have to be applied whenever they fit the case at issue. Applicable national norms must be interpreted in conformity with the ECHR.[90] This is an obligation based not only on international law, but the Constitution itself. The constitutional basis here is the principles of the Rechtsstaat and openness or friendliness of the Basic Law to international law; the FCC additionally quotes Article 1, paragraph 2, Basic Law.[91] The FCC applies this perception to its own interpretation of the Constitution.[92] Decisions of the Federal Administrative Court using Article 6, paragraph 2, ECHR present an example for applying the presumption of innocence principle (Article 6, paragraph 2, ECHR) to disciplinary proceedings.[93] A failure of courts to apply the law in conformity with the ECHR can therefore be claimed to be a violation of the corresponding constitutional basic right in conjunction with the Rechtsstaat principle under a constitutional complaint procedure.[94]

11. Do national courts try to avoid conflicts with the ECHR by means of constitutional review or construing national law in conformity with the constitution (Verfassungskonforme Auslegung)?

If legislation of a Land is at issue, any court may ask the FCC for a preliminary ruling according to Article 100, paragraph 1, Basic Law (concrete norm control), because provisions having the rank of federal law, e.g., the ECHR articles, always take precedence over the Land law. In the abstract norm control procedure (Article 93 BL), the Convention is also a possible yardstick for Land law.

Concerning federal law only the Basic Law qualifies as legal yardstick, and the ECHR can therefore only play an (indirect) role in a norm control procedure, if the constitutional norm is interpreted in a way that reflects a Convention right. Using the corresponding constitutional right the courts may ask for a preliminary ruling in order to gain clarity not only on the constitutionality of a federal statute but, implicitly, also on its conformity with the Convention. The same result may be achieved by construing the norm in conformity with the Constitution, [95] always under the condition that the Constitution can be successfully interpreted in the light of the ECHR. Since the issue of compatibility with the Constitution will be in the foreground in all these cases, the courts' intention to avoid a simultaneous conflict with the Convention will generally not made explicit.[96]

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[89] BVerfGE 128, 326; *M.* v. *Germany*, ECtHR 17 December 2009, appl. no. 19359/04. Further Mellech, *supra* n. 40, p. 182.
[90] BVerfGE 111, 307 (324) and *infra* answer to question 15.c; Giegerich, *supra* n. 40, p. 71; Hoffmann, *supra* n. 43, p. 97.
[91] Article 1, paragraph 2, BL reads: 'The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.' See BVerfGE 111, 307 (329); Klein, *supra* n. 49, p. 35.
[92] BVerfGE 74, 358 (370); 111, 307 (317); BVerfG 7 December 2011, BVerfGE 130, 1 (30).
[93] BVerwG 7 December 2006, 2WDB3.06; BVerwG 12 February 2003, 2WD8.02; U. Widmaier, 'Der Einfluss der EMRK auf das (nationale) öffentliche Dienstrecht', in: A. Höland, ed., *Wirkungen der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im deutschen Recht* (Berlin, Berliner Wissenschaftsverlag 2012) p. 147 at p. 149.
[94] BVerfGE 111, 307 (329).
[95] For an example that this is not possible see BVerfGE 128, 326 (400).
[96] It might happen more often that a person in a constitutional complaint procedure claims a violation of a Convention right together with the fundamental right of the Basic Law, but in such a case the FCC would have to say that the complaint is inadmissible insofar as it is based on the Convention, but the rights protected by the Basic Law have to be understood in the light of the Convention.

12. Do national courts use EU law as a vehicle to review the compatibility of national law with the ECHR?

As far as can be seen at the time of writing, no attempt, though theoretically possible, has been made by German courts to use the EU Charter of Fundamental Rights (Article 52, paragraph 3 and Article 53) or the general principles of EU law (Article 6, paragraph 3, EU Treaty) as a means to enhance the legal importance of the ECHR within domestic law by letting the Convention participate in the higher rank of the EU law and enabling it to become a yardstick in a review procedure.[97]

13. Is there a preferential order in the use of techniques (i.e. treaty-conform interpretation, setting aside national law, ordering the legislature to amend legislation, constitutional review, *Verfassungskonforme Auslegung*) to avoid violations of the ECHR?

The preferred method to avoid conflicts with the ECHR is certainly to interpret the national provision (including the Constitution) in harmony with the international obligation as far as is legally possible.[98] The FCC has held that the principle of proportionality is especially a suitable instrument to take account of the values contained in the Convention.[99] If a court finds that such a harmonizing interpretation would be inadmissible,[100] then constitutional review in the form of the concrete norm control procedure is certainly the most common way to clarify the compatibility of a norm with a higher norm, especially the Basic Law or indirectly, as has been pointed out above (4.a and 11), with the ECHR. By its judgment finding a violation of the Constitution (indirectly the Convention), the Federal Constitutional Court would declare the relevant norm null and void or, possibly, merely unconstitutional, permitting the further application of the norm for a transitional period of time and setting a time limit for the enactment of a new law or provision.[101]

PART 3 – Dealing with the judgments and decisions of the ECtHR

14.a Do the national courts, when interpreting and applying ECHR provisions, refer to judgments/decisions of the ECtHR? If so, do they do this standardly / frequently / sometimes / rarely?

Although the judgments of the ECtHR have no generally binding force,[102] according to the jurisprudence of the Federal Constitutional Court the relevant judgments of the ECtHR have always to be taken into account by national courts when provisions of the Convention have to be applied to the case at issue. The reason for this is that these judgments reflect the present state of development of the Convention and its Protocols.[103] The failure to take the ECtHR's jurisprudence into account may

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[97] An interesting case, however, is the preliminary procedure instituted by the Tribunale di Bolzano (Italy); CJEU 24 April 2012, case C-571/10, paras. 59-63. See also generally G. Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts', 23 *European Journal of International Law* (2012) p. 401-424.

[98] 'Völkerrechtskonforme' or 'völkerrechtsfreundliche Auslegung'; see Mellech, *supra* n. 40, p. 55.

[99] BVerfGE 128, 326 (371 et seq., 389).

[100] For the limits of an interpretation that takes account of the international norm see BVerfGE 128, 326 (371): the limits are reached where the generally recognised methods of legal interpretation do not permit the harmonising interpretation. See further: R. Bernhardt, 'Völkerrechtskonforme Auslegung der Verfassung? Verfassungskonforme Auslegung völkerrechtlicher Verträge?', in H.-J. Cremer et al., eds., *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger* (Berlin, Springer 2002) p. 391.

[101] E.g., BVerfGE 128, 326 (332); cf. also Sections 78 and 35 of the Law on the FCC.

[102] E. Klein, 'Should the binding effect of the judgments of the European Court of Human Rights be extended?', in P. Mahoney et al., eds., *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal* (Köln, Carl Heymanns 2000) p. 710.

[103] BVerfGE 111, 307 (319).

pave the way for an individual constitutional complaint alleging that the corresponding constitutional right (which must be seen in the light of the Conventional right) and the *Rechtsstaat* principle have been violated.[104] After some early hesitation the German courts refer with increasing frequency to the Convention and the Human Rights Court's judgments.[105] Between 1 January 2005 and 21 January 2012 alone, the Federal Court of Justice (*Bundesgerichtshof*) referred in 127 cases to judgments of the ECtHR, and the Federal Constitutional Court referred to 83 judgments between 14 October 2004 and 7 February 2012.[106]

14.b. Does it make a difference if your state was not a respondent party to the case at hand? I.e., do the courts generally refer to the case law of the Court as a whole (*res interpretata* effect), or is special importance given to the judgments/decisions to which the state has been a party?

One might assume that judgments directed against Germany will primarily be taken into account by the domestic courts. However, legally speaking there is no difference between judgments directed against Germany[107] and judgments addressed to other States parties to the ECHR, because in all cases the judgments reflect today's understanding of the Convention rights.[108] Therefore all judgments of the ECtHR have the same function: to provide orientation for and lead the interpretation of the Convention (*Orientierungs- und Leitfunktion*) by all its applying bodies or courts, which goes far beyond the respect of the *res iudicata* principle.[109] The Federal Constitutional Court argues that this view is helpful in order to avoid conflicts between the international obligations of the Federal Republic of Germany and decisions of international courts having at least precedential effects. The openness of the Basic Law to international law mirrors a perception of sovereignty that not only does not impede further developments of international and supranational obligations for Germany but even presupposes and expects them.[110]

15.a. What general methods exist for the national courts to respond to such judgments (e.g. reconsidering a case after reopening; changing interpretation of national law in similar cases)?

According to Article 46, paragraph 1, ECHR the States parties have to abide by final judgments of the ECtHR in any case to which they are parties. Formerly, the implementation of this provision created some problems, because the cases decided by the ECtHR had already been finally decided by the domestic courts (*res iudicata*). The result was that, notwithstanding the ECtHR's judgment finding a violation of the Convention, a given case could not be reopened, regardless of the nature of the judicial procedure (private, administrative or criminal). Thus, e.g., individuals having been convicted and sentenced were left entirely, to become pardoned and/or to receive *ex gratia* compensation.[111]

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[104] BVerfGE 111, 307 (329). It is quite interesting to note that not only the FCC supports the implementation of ECtHR judgments. Vice versa the ECtHR held that Article 6, paragraph 1, ECHR is violated if the State does not abide by a binding order of the FCC; *K.* v. *Germany*, ECtHR 13 January 2011, appl. no. 32715/06,.

[105] This is also the assessment of Mellech, *supra* n. 40, p. 206.

[106] For the FCC this means 2-3% of all cases; see Institut International des Droits de l'Homme, *Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im Bundesgerichtshof und Bundesverfassungsgericht* (Strasbourg 2012) p. 16 and 73-77. For some older cases see Sternberg, *supra* n. 40, p. 62.

[107] Apart from the *res iudicata* effect flowing from Article 46, paragraph 1, ECHR.

[108] Actually, the cases to which the Federal Court of Justice and the FCC have referred (*supra* n. 106) comprise more judgments delivered against other States than against Germany.

[109] Limited to the same facts and the same parties to a given case; see also BVerfGE 128, 326 (368).

[110] BVerfGE 128, 326 (369): "Die Völkerrechtsfreundlichkeit des Grundgesetzes ist damit Ausdruck eines Souveränitätsverständnisses, das einer Einbindung in inter- und supranationale Zusammenhänge sowie deren Weiterentwicklung nicht nur nicht entgegensteht, sondern diese voraussetzt und erwartet."

[111] See also in this context Article 41 ECHR (just satisfaction).

Nowadays, this problem has been resolved. A new section included in the Criminal Procedure Code (*Strafprozessordnung*) in 1998[112] provides that a case may be reopened in favour of the convicted person, if the ECtHR has found a violation of the ECHR (or its Protocols) and the national judgment rests on this violation.[113] In 2006 an analogous provision was included in the Civil Procedure Code (*Zivilprozessordnung*).[114] Since all the other Codes of Procedure (for administrative, financial, labour, social courts) refer to the Civil Procedure Code, the provision extends to the judgments of all the other courts. Only the decisions of the Federal Constitutional Courts are not covered.[115] However, in a newer judgment this Court has held that judgments of the ECtHR can be equated with legally relevant changes of the factual or legal situation which may overcome the *res iudicata* effect of its own judgments and, by the same token, the legal force which FCC decisions have obtained in norm control and constitutional complaint procedures.[116]

It should be noted that the opportunity to reopen a case is excluded for cases which received *res iudicata* status prior to 31 December 2006. The Federal Labour Court has held that this provision neither violates the Basic Law nor the ECHR, as the latter does not requir restitution as reaction to a violation.[117]

The opportunity to reopen a case is restricted to the individual who has won his or her case in Strasbourg, i.e. where the ECtHR has found a violation of the Convention, and the domestic court's decision rests on this mistake. The reopening procedure cannot thus be transferred to any parallel cases.

15.b. Do national courts generally comply with the ECtHR's judgments against your own state?

It may be assumed that the courts generally comply with ECtHR judgments. However it has happened that courts have resisted compliance. For example, the Higher Land Court (*Oberlandesgericht*) Naumburg has refused to comply with a judgment of the ECtHR in a dispute on parental care and visiting rights of one parent arguing that the well-being of the child has to be viewed differently from the ECtHR's assessment. The Federal Constitutional Court (by a constitutional complaint procedure) had to hand down several rulings until the ordinary court gave in.[118] Moreover, administrative courts arguing that the ECtHR would overstretch Article 3 ECHR as a limitation for expulsion or extradition, did not initially apply the Court's jurisprudence to parallel proceedings.[119] There was no resistance to compliance with the judgment in the case directly decided by the ECtHR, however.

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[112] Federal Gazette 1998, Part I, p. 1802.
[113] Section 359 no. 6 Criminal Procedure Code
[114] Section 580 no. 8 Civil Procedure Code, Federal Gazette (*Bundesgesetzblatt*), Part I, 2006, p. 3416. For this development see H.-J. Cremer, 'Die Verurteilung der Bunderepublik Deutschland durch den Europäischen Gerichtshof für Menschenrechte als Wiederaufnahmegrund nach § 153 Abs. VwGO i.V. mit § 580 Nr. 8 ZPO', in P. Baumeister et al., eds., *Staat, Verwaltung und Rechtsschutz. Festschrift für Wolf-Rüdiger Schenke* (Berlin, Duncker & Humblot 2011) p. 649.
[115] For the reasons see Klein, in Benda and Klein, *supra* n. 49, p. 41.
[116] See BVerfGE 128, 326 (364-5) and Section 31 para. 2 of the Law on the FCC; see also Hoffmann, *supra* n. 43, p. 97.
[117] BAG 22 November 2012, 2 AZR 570/11, 39 *Europäische Grundrechte Zeitschrift/EuGRZ* (2010) p. 767, relating to *Schüth* v. *Germany*, ECtHR 23 September 2010, appl. no. 1620/03.
[118] See only BVerfGE 111, 307 (*Görgülü*).
[119] See BVerwG 15.4.1997, BVerwGE 104, 265 (269); Later on the Federal Administrative Court (*Bundesverwaltungsgericht*) adopted the jurisprudence of the ECtHR; see BVerwG 16 December 1999, BVerwGE 110, 203 (210); 111, 223; BVerwG 7 December 2004, BVerwGE 122, 271 (*Kalif von Köln*); see also C. Walter, 'Anmerkung', 60 *Juristenzeitung* (2005) p. 788 at p. 790.

15.c. Do national courts try to adapt or limit the effect of the Court's judgments, e.g. by adapting the Court's interpretation to fit in as far as possible with the national legal system and the national legal traditions?

The FCC has found that the Convention must be applied to all suitable cases before the courts.[120] Since the jurisprudence of the ECtHR reflects the present understanding of the ECHR norms, it has to be taken into account by the domestic courts. 'Taking into account' means that the courts have seriously to consider the ECtHR's decisions and, if they do not comply, to give convincing reasons for their attitude.[121] In this context the FCC has held that the judgments of the ECtHR must be carefully introduced by the courts into the relevant area of the legal order and adapted to the principles governing the specific field of law; it could not be the task of the ECtHR itself to make this adaption.[122] Although this is a fundamentally reasonable approach it opens the risk that the courts might on this basis try to avoid the consequences of the ECtHR's judgments.[123] This may happen especially when different fundamental rights positions (*mehrpolige Grundrechtsverhältnisse*) must be balanced, e.g., the right to freely express opinions or the freedom of the press with the right to be let alone (right to privacy), and different opinions exist on how to balance these rights.[124] The *Caroline of Monaco/Von Hannover* v. *Germany* case decided by the ECtHR[125] and the previous and later domestic court decisions demonstrate on the one hand that such situations can in fact be addressed differently, but show on the other hand that the view of the ECtHR finally prevailed: the ordinary courts as well as the Federal Constitutional Court changed their former jurisprudence, having provided basically less protection for persons of contemporary history.[126] In the preventive detention case (*Sicherungsverwahrung*), the FCC insisted against the qualification of the ECtHR on its opinion that this kind of detention has to be assessed as a special measure, not a penalty.[127] However, the FCC followed the ECtHR's judgment as far as a violation of the principle of proportionality is concerned and therefore held the relevant domestic provisions to be unconstitutional.[128]

16. How do courts respond to judgments/decisions of the ECtHR in cases to which the state has not been a party?
16.a. Do the national courts apply a strict 'mirror principle'-approach, i.e. do they apply the Court's interpretations as carefully and strictly as possible without offering more or less protection to fundamental rights?

Judgments not addressed to Germany have generally to be taken into account in the same way as judgments in cases to which Germany was a party. Such judgments cannot, however, form a legal basis to reopen a case; the only options that exist are the possibility of pardon and *ex gratia* compensation.

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[120] *Supra* n. 90.
[121] BVerfGE 111, 307 (324).
[122] BVerfGE 111, 307 (327); 128, 326 (371).
[123] See the critical remarks by J.A. Frowein, 'Die traurigen Missverständnisse. Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte', in K. Dicke et al., eds., *Weltinnenrecht. Liber amicorum Jost Delbrück* (Berlin, Duncker & Humblot 2005) p. 279 at p. 284; Mellech, *supra* n. 40, p. 102.
[124] BVerfGE 111, 307 (324-5).
[125] *Von Hannover* v. *Germany (no. 1)*, ECtHR 24 June 2004, appl. no. 59320/00.
[126] BGH 6 March 2007, BGHZ 171, 275 (278, 283); BVerfG 26 February 2008, BVerfGE 120, 180 (203).
[127] Being a penalty the preventive detention would certainly be covered by the *nullum crimen, nulla poena* rule.
[128] *M.* v. *Germany*, ECtHR 17 December 2009, appl. no. 19359/04; BVerfGE 128, 326 (376).

16.b. Do the national courts (sometimes) provide more protection to fundamental rights, e.g. by consciously applying national constitutional provisions or interpreting the ECHR provisions in a more protective manner?

The Federal Constitutional Court has held that a Convention right cannot be applied to a case if the application would result in limiting or derogating from any human right guaranteed under another human rights instrument or under the Constitution.[129] The same idea is expressed by Article 53 ECHR itself. If many national judgments do not refer to provisions of the Convention, the usual reason will be that the courts are convinced that the Convention rights provide not more but rather less protection than the rights enshrined in the Basic Law as interpreted by the FCC.[130]

16.c. Do national courts try to adapt or limit the effect of the Court's judgments/decisions, e.g. by adapting the Court's interpretation to fit as far as possible with the national legal system and the national legal traditions?

For judgments of the ECtHR not directed against Germany, generally the same rules apply as for judgments addressed to other States. Thus, according to the jurisprudence of the FCC, those judgments have to be carefully introduced into the relevant field of the domestic law. The reader is referred to the explanations given above (see *supra*, answer to question 15.c).

17. How do courts deal with the ECtHR's margin of appreciation doctrine?

It was not possible to find an example demonstrating the willingness of national courts to use the margin of appreciation doctrine of the ECtHR as an instrument to minimise the impact of the Convention rights on domestic law. The legal literature, however, has taken up the idea of substantive subsidiarity to which the jurisprudence of the ECtHR should be submitted.[131] The margin of appreciation doctrine is certainly relevant in this context, but it must be understood that an essential part of the doctrine is that the ECtHR has always claimed to have the final say on its limits.[132] Application of the doctrine which, by the way, is by no means undisputed[133] would therefore not really help in the end to escape from the ECtHR's jurisprudence.

18. How intensely do courts review legislation and/or administrative decisions on conformity with the ECHR? Do they always opt for marginal / deferential review (test for manifest violation) or can the scrutiny be more strict?

Insofar as the Convention can serve as legal yardstick it has to be strictly applied. There is no evidence that the Convention rights permit the courts a more lenient attitude than other norms having the rank of (federal) law. It always depends on the individual norm itself whether it permits a lesser or more intense degree of scrutiny.[134] There is no difference in this respect between international

[129] BVerfGE 111, 307 (317); 128, 326 (371).
[130] Today most judges know the ECHR, even if probably not yet sufficiently. By contrast the provisions of the ICCPR are still not very well known, even in the judiciary.
[131] G. Lübbe-Wolff, 'How can the European Court of Human Rights Reinforce the Role of National Courts in the Convention System?', 32 *Human Rights Law Journal* (2012) p. 11 at p. 14.
[132] E. Klein, 'Der Schutz der Grund- und Menschenrechte durch den Europäischen Gerichtshof für Menschenrechte', in D. Merten and H.-J. Papier, eds., *Handbuch der Grundrechte in Deutschland und Europa*, Vol. VI/1 (Heidelberg, C.F. Müller 2010) p. 593 at p. 619.
[133] See O. Gross and Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights, in 23 *Human Rights Quarterly* (2001) p. 625.
[134] As to constitutional provisions rightly K. Schlaich, 'Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen', in 39 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1981) p. 99 at p. 112.

and national norms. If the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), by regulating the consequences of procedural mistakes in the context of the issue of administrative decisions, distinguishes between their voidability (*Anfechtbarkeit*) and nullity (*Nichtigkeit*), this distinction does not say anything about the intensity of the courts' review. Usually even violations of the Constitution do not lead to the automatic nullity of an administrative act, but the question must be decided on the basis of an application by the courts. There is no indication whatsoever that an examination of an administrative decision would be conducted differently if the Convention instead of the Basic Law were the relevant yardstick.

It is true that concerning the (un-) constitutionality of parliamentary acts the FCC makes a problematic distinction: when rules regarding the legislative procedure are not respected, this will only have constitutional consequences if such mistakes are evident.[135] With regard to the violation of substantial provisions (like basic rights), however, every violation will lead to the assessment of the statute's unconstitutionality and, as a rule, to the declaration of its nullity. There is no gradation of constitutional violations.[136] The view that the rights under the Convention are influencing the interpretation of the fundamental rights of the Basic Law and therefore may become an indirect yardstick for statutes, particularly in the constitutional complaint procedure, does not change this result.

According to the foregoing statements, there is no distinction between manifest and less manifest violations, at least as violations of basic rights are concerned , including the rights protected under the Convention.

19. Do the courts make use of special interpretative techniques used by the ECtHR, such as evolutive interpretation (interpretation 'in the light of present day conditions') or consensus interpretation? If so, can you estimate if they do so standardly / frequently / sometimes / rarely?

As far as can be seen, the national courts do not now explicitly refer to the methods of evolutive interpretation or consensus interpretation used by the ECtHR, but they apply the rights of the Convention in the way this Court has interpreted them using its special interpretative techniques. In other words: the courts usually accept the interpretative result (and have to accept it up to the limits of possible interpretation already mentioned)[137] without questioning the methods by which the result was obtained. The view according to which teleology is an acknowledged element in the interpretative theory is generally shared and applied. This means that the fundamental rights of the Basic Law (and inherently the Convention rights) have to be interpreted under present day conditions[138] and that these rights (as objective norms) permeate the whole domestic legal order with the result of permanent development and change.[139]

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135 BVerfG 26 July 1972, BVerfGE 34, 9 (25).

136 See E. Klein, 'Stufen der Verfassungsverletzung?', in O. Depenheuer et al., eds., *Staat im Wort. Festschrift für Josef Isensee* (Heidelberg, C.F. Müller 2007) p. 169 at p. 181.

137 See *supra* the answer to question 13.

138 E.g., BVerfG 15 December 1983, BVerfGE 65, 1 (43): right to informational self-determination (*Grundrecht auf 'informationelle Selbstbestimmung'*); BVerfG 27 February 2008, BVerfGE 120, 274 (302): right to confidence and integrity of technological information systems (*Grundrecht auf Gewährleistung der Vertraulichkeit und Integrität informationstechnischer Systeme*).

139 E.g., right to personality, data protection, sexual orientation, transsexualism etc.

20. Is the role and position of the ECtHR debated in your country? If so:
20.a. Where is the criticism mainly visible (media, politics, scholarship, court room)?

There is no fundamental or widespread criticism in Germany of the role of the ECtHR, but it is true that criticism arises from time to time, created by individual judgments.[140] This criticism is mainly found in scholarly writings, the authors sometimes being (high) judges themselves.[141] The mass media do not dedicate many principled contributions to this topic, and politicians are quite hesitant to criticize judgments, which will usually be in favour of individuals. One cannot say that the jurisprudence of the ECtHR is a matter of general discussion, certainly less than decisions of the Federal Constitutional Court.

20.b. What kind of criticism is usually voiced (complaints about expansion of scope; quality of judgments; independence and impartiality of judges; disrespect for national sovereignty; insufficient knowledge of national law; etc)?

The main point of criticism does not concern a general allegation of disrespect of the national sphere, but is rather addressed to some alleged insensitivity of the ECtHR regarding legal views which have evolved over time and were (more or less) recognized by the national courts and academia. A good example is given by the Caroline von Hannover case.[142] According to the domestic jurisprudence, supported by the Federal Court of Justice (*Bundesgerichtshof*) as well as the Federal Constitutional Court, the right to privacy of 'persons of contemporary history' is more restricted than that of other individuals. The ECtHR did not follow this view. While the media reported the judgment, there was no genuine storm of indignation. However, the case was discussed intensely by academics, the pros and cons being generally fairly balanced,[143] which led to an interesting exchange of views between the President of the FCC and the President of the ECtHR.[144] At the end of the day, the Federal Court of Justice and the Federal Constitutional Court accepted the opinion of the Strasbourg Court and changed their jurisprudence accordingly. The same happened concerning the ECtHR's judgments on preventive security. Here again the FCC finally accepted the position of the Strasbourg Court and obliged the legislature to enact a new law.[145]

20.c. If there is any criticism, is this a new development? When did the criticism first become apparent? Can you explain what gave rise to the criticism?

The generally quite moderate kind of criticism expressed in Germany concerning a few judgments of the ECtHR is not a new phenomenon. But it should perhaps be said that the Caroline case especially has brought the ECtHR to the attention of the general public.[146] However, this effect was probably based more on the celebrities involved than on the legal and institutional issues concerned. In the preventive detention case large numbers of the public were and still are afraid that people having served their penalty for rape or sexual abuse might become recidivists and therefore a danger for the public once again.

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140 Lübbe-Wolff, *supra* n. 131, p. 14.
141 See the former President of the FCC Hans-Jürgen Papier, 'Execution and Effect of the Judgments of the European Court of Human Rights From the Perspective of German National Courts', 27 *Human Rights Law Journal* (2006) p. 1.
142 See *supra* answer to question 15.c, with references.
143 For references to this discussion see A. Zimmermann, *Grundrechtsschutz zwischen Karlsruhe und Straßburg* (Berlin, Walter de Gruyter 2012) p. 25 at n. 73.
144 See the controversial interviews of H.-J. Papier, in *Frankfurter Allgemeine Zeitung* 9 December 2004 and L. Wildhaber, in *Der Spiegel* 47/2004.
145 See *supra* the answer to question 9; Zimmermann (*supra* n. 143) refers to some examples of political reaction.
146 B. Rudolf, 'Council of Europe: Von Hannover v. Germany', in 4 *International Journal of Constitutional Law* (2006) p. 533-539.

20.d. Does the criticism affect the status of the ECHR and the ECtHR's judgments/decisions in judicial decision making? If so, what concrete effects does this have (e.g. more frequent references to the margin of appreciation doctrine, more references to national constitutional law, restrictive interpretation of ECtHR judgments/decisions, disapplying the ECHR in favour of national (constitutional) law)?

There is no indication that the criticism mentioned above has led to any kind of hostile attitude to the ECtHR. As long as the highest domestic courts, including the Federal Constitutional Court, accept its jurisprudence, resistance of the lower courts is fairly improbable, even if possible, at least partially.[147]

21. Are there any intentions at the political level to amend the constitution or legislation to change the courts' competences in relation to the interpretation and application of the ECHR?

On the political level there are no intentions to amend the Basic Law or to enact laws to change the courts' competencies in relation to the interpretation and application of the ECHR. But discussions do take place on a high academic level aimed at reducing ion the controlling power of the ECtHR vis-à-vis decisions of the FCC. Three main proposals are made in this respect. First, starting from the margin of appreciation doctrine of the ECtHR, a kind of a 'corridor solution' is suggested, according to which, when two right conflict, e.g., freedom of the press and right to privacy, a space of national discretion should be recognised and thus the balancing of the rights and interests should be definitively left to the domestic courts.[148] Similarly, a second proposal wants to restrict the competence of the ECtHR to fundamental decisions indicating the general direction, while the national (constitutional) courts should be responsible for the establishment of individual justice by balancing the rights at stake.[149] Finally, it is suggested that the *Bosphorus* jurisprudence[150] should be transposed, as it relates to the relationship between the Strasbourg and the Luxemburg Court, to the relationship between ECtHR and FCC.[151] This would likewise result in a wider exemption from the controlling power of the ECtHR. Apart from the fact that the first two proposals mentioned above are hardly compatible with the Convention, it must be stressed that apparently none of these suggestions has gained considerable support, either in the political or the academic arena.

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[147] There is no formal legal rule of precedence in Germany, although the decisions of the FCC are generally binding; Section 31, paragraph 2, Law on the FCC.

[148] In this sense two judges of the FCC: G. Lübbe-Wolff, 'Der Grundrechtsschutz bei konfligierenden Individualrechten. Plädoyer für eine Korridorlösung', in: M. Hochhuth, ed., *Nachdenken über Staat und Recht. Kolloquium zum 60. Geburtstag von Dietrich Murswiek* (Berlin, Duncker & Humblot 2010) p. 193; J. Masing, 'Vielfalt nationalen Grundrechtsschutzes und die einheitliche Gewährleistung der EMRK', in: U. Blaurock et al., eds., *Festschrift für Achim Krämer* (Berlin, Walter De Gruyter 2009) p. 61.

[149] In this sense the former President of the FCC, Hans-Jürgen Papier, in M. Hilf, ed., *Höchste Gerichte an ihren Grenzen* (Berlin, Duncker & Humblot 2007) p. 135 at p. 155-56.

[150] *Bosphorus v Ireland*, ECtHR (GC) 30 June 2005, appl. no. 45036/98.

[151] In this sense again two judges of the FCC: H.-J. Papier, Das Rechtsprechungsdreieck Karlsruhe-Luxemburg-Straßburg, 89 *Speyerer Vorträge* (2006), S. 18; U. Steiner, 'Zum Kooperationsverhältnis von Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte in S. Detterbeck et al. eds., *Recht als Medium der Staatlichkeit. Festschrift für Herbert Bethge* (Berlin, Duncker & Humblot 2009) p. 653 at p. 663.

PART 4 – Access to information and judgments

22. To what extent do national judges have access to and knowledge of the ECHR and the case law of the ECtHR?

22.a. Are judges trained to apply the ECHR, either in law schools or in professional training?

Law students will usually learn (mostly rather marginally) about the ECHR from lectures on the constitutional basic rights, offered in the second semester of their studies. The impact of the ECHR on the domestic penal and criminal procedural law will also be discussed in criminal law classes, as well as in labour law and other classes, but there will be no systematic, detailed instruction of the protection system as such. Only students who choose the special subject 'international public law and European law' (not before their fourth semester) will gain closer familiarity with international human rights law and here particularly the ECHR and its protective mechanisms. Professors of international law in Germany have for a long time complained about this poor state of affairs. There is also no systematic training for judges regarding human rights law, but various courses are offered for judges covering specific issues of the Convention and protection by the ECtHR.[152] Human rights research and teaching in the law faculties is of course undertaken at many Universities, in particular by the Human Rights Center at the University of Potsdam, the only University institute in Germany specifically dedicated to human rights.[153]

22.b. How is information about the judgments/decisions of the ECtHR made available to the courts?

ECtHR judgments delivered against Germany will be sent by the Federal Ministry of Justice to the courts concerned with the specific case. Information about the jurisprudence of the ECtHR in general can be taken from generally available sources like periodicals in which judgments are published,[154] or where at least a link is made to the databases of the ECtHR (Hudoc) or the Federal Ministry of Justice (see also 22.c). Of course there is also the official collection of judgments of the Court, but this will usually not be available in the court libraries, but only those of the highest (federal) courts (and, of course, law faculties).

22.c. Are important judgments/decisions of the ECtHR available in the national language, e.g. because the government provides translations?

The Federal Ministry of Justice publicises all judgments and decisions of the ECtHR addressed against Germany in the German language on a special website.[155] The German Institute for Human Rights in Berlin refers to this data base, too.[156] More comprehensive because it also contains judgments against other States, is another database containing all judgments which have been translated into German and published in periodicals throughout the German language speaking area (Germany, Austria, Switzerland).[157]

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[152] Here the Academy for Judges (Richterakademie) in Trier should be mentioned.
[153] The Institute was founded in 1994.
[154] E.g., Europäische Grundrechte-Zeitschrift (EuGRZ), Die Öffentliche Verwaltung (DÖV), Deutsches Verwaltungsblatt (DVBl.), Neue Juristische Wochenschrift (NJW), Neue Zeitschrift für Verwaltungsrecht (NVwZ).
[155] See www.bmj.de/DE/Recht/OeffentlichesRecht/MenschenrechtsschutzEuroparatInternationaler Menschenrechts-schutz/EuropaeischerGerichtshoffuerMenscherrechte/Urteile.
[156] See www.institut-fuer-menschenrechte.de/de/menschenrechtsinstrumente/europarat/europ-menschenrechts-konvention-und-gerichtshof-fuer-menschenrechte.
[157] www.egmr.org. The databases were established by prof. dr. Marten Breuer, University of Konstanz.

22.d. Do you think there is an impact on the use of ECtHR judgments/decisions by national courts of the fact that they are usually only available in English and French?

It is highly probable that many judges do not know that the ECtHR judgments directed against Germany, as well as many others judgments, are actually available in German. When judges turn to the website of the ECtHR using HUDOC they will find primarily the original version of the judgments in English or French (though the translations of the Federal Ministry of Justice can be found there, too). Although the foreign language capabilities have generally improved recently, it can be expected that reading a text in a foreign language will take more time and be more onerous, and that this will have a negative impact on any intensive reading and use of a judgment.

23. Are national judgments/decisions in which the ECHR plays a role available electronically? Are they translated into English?

As of today, most national judgments, certainly those of the higher courts, are available electronically, and for this reason the judgments and decisions referring to the ECHR are also similarly available. There is, however, no special database where such national judgments are collected separately. Thus it is extremely difficult to gain a general view of the relevant decisions.[158] The national judgments are not usually translated into English or another foreign language.[159] If translations are made, they are undertaken as private initiatives, e.g., in order to prepare for a publication in foreign books or periodicals.

PART 5 – Concluding questions

24. To what extent do you think that there is a connection between, on the one hand, the main features and characteristics of your constitutional system and the status of international law in the national legal system and, on the other hand, the impact of the ECHR and the judgments of the ECtHR on national case law?

The characteristics of the Basic Law which have already been described above[160] certainly have a significant impact on the influence of the ECHR and the jurisprudence of the ECtHR on national case law. It must be said, however, that the signals emanating from the Basic Law may be considered ambivalent.[161] On the one hand, the Basic Law has established a rather comprehensive catalogue of civil and political rights, strongly enriched and developed by well-known, fairly sophisticated jurisprudence of the Federal Constitutional Court over a period of sixty years. It is this richness of substantial and procedural basic rights protection at the national level that created, at least for quite a long time, a certain defensive or at any rate hesitant attitude regarding norms and mechanisms of international human rights protection. The perception was that this kind of protection was rather superfluous in and for Germany. On the other hand, a principal feature of the Basic Law is its friendliness and openness to international law, particularly human rights, as is clearly emphasised in Article 2, paragraph 2, BL.[162] This openness to international influence relatively slowly started to bear fruit. Only after

[158] But see now the extremely helpful publication of the Institut International des Droits de l'Homme, *Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im Bundesgerichtshof und Bundesverfassungsgericht*, Strasbourg June 2012. The Report covers only the period from 1 January 2005 to 31 March 2012, i.e. the period after the landmark decision in the *Görgülü* case had been handed down (BVerfGE 111, 307).
[159] There is a collection of important judgments of the FCC in English, relating to specific subjects: *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court* (Baden-Baden, Nomos, since 1992).
[160] See *supra* the answers to part 1 of the questionnaire.
[161] Cf. Hoffmann, *supra* n. 43, p. 115.
[162] See *supra* n. 41.

Germany had recognized the opportunity to bring individual complaints before the ECtHR, and especially after the 11th Protocol entered into force, did the whole importance (also the quantative aspect) of the Convention and the ECtHR become visible, and the Federal Constitutional Court also became increasingly involved. Today it is just the FCC that contributes consistently to the recognition of the provisions of the Convention and the Strasbourg Court's judgments and their implementation, even if disputes remain concerning the "final say" of the German Constitutional Court in the dialogue between the national and international courts[163] and the correct balancing of rights of individuals in some cases.[164] However, as has been shown, these judicial reservations have a more theoretical importance than a practical impact. At any rate, the general awareness of the Convention has considerably grown over the years, despite or perhaps even because of some much discussed and even disputed judgments of the ECtHR and the FCC.

25. How does the application of the ECHR in the case law of the states relate to the role of national fundamental rights (e.g. constitutional rights)?

Although the application of the ECHR by domestic courts has become increasingly common over the years, there is no doubt that national fundamental rights still play the primary role in the relevant case law.[165] Even if Convention rights are applicable, they usually do not immediately govern the case, as long as a national fundamental right exists that does not grant less protection. They may, however, influence the interpretation of the national rights, as these rights have to be viewed in the light of the rights under the Convention.[166] But it thus by no means follows that the national fundamental rights become displaced by the rights under the Convention.

26. To what extent do you think that debates on the role of the ECtHR and its judgments have an impact on national case law?

General discussions of the importance of the Convention and the role of the ECtHR and also the more focused debates on particular judgments have certainly contributed to enhancing the awareness of the public in general, but especially the judiciary, of the Convention's existence, its direct applicability and the vast jurisprudence of the ECtHR. This is particularly true since 2004, when the Federal Constitutional Court handed down its landmark decision in the Görgülü case.[167] For a long time the question from the courts (and of politicians!) was: "What will Karlsruhe (i.e. the FCC) say about it?" Increasingly another question is being asked: "What will Strasbourg (i.e. the ECtHR) say about it?" At least the legal community has learnt that the blue sky arches not only over Karlsruhe but also the Convention and the Strasbourg Court. For some (not least the judges of the FCC) this was a hard lesson to learn.[168] But today these two questions are conjoined. A good example is the current discussion about a possible new trial before the FCC aimed at prohibiting a political party, the National Democratic Party (NPD), which is on the very right wing of the political spectrum. Because of the

[163] BVerfGE 128, 326 (369).
[164] See the cases *Von Hannover* and *Görgülü*, discussed *supra* in the answer to question 15.c; C. Grabenwarter, 'Das mehrpolige Grundrechtsverhältnis im Spannungsfeld zwischen europäischem Menschenrechtsschutz und Verfassungsgerichtsbarkeit', in P.-M. Dupuy et al., eds., *Common Values in International Law. Essays in Honour of Christian Tomuschat* (Kehl, N.P. Engel Verlag 2006) p. 193.
[165] Lambert Abdelgawad and Weber, *supra* n. 48, p. 159: '[T]he ECHR thus remains supplementary to German constitutional rights.'
[166] Therefore it is important that the courts should always take account of the Convention rights including the jurisprudence of the ECtHR in order to ensure that this influence can actually be respected; see E. Klein, 'Die Grundrechtsgesamtlage', in M. Sachs et al., eds., *Der grundrechtsgeprägte Verfassungsstaat. Festschrift für Klaus Stern* (Berlin, Duncker & Humblot 2012), p. 389 at p. 391.
[167] BVerfGE 111, 307.
[168] Of course the same problems arose with regard to EU law and the jurisprudence of the Court of Justice of the European Union.

failure of a first attempt for procedural reasons in 2003[169], understandably a very great deal of attention is being given to the fulfilment of all procedural and constitutional requirements in such difficult and politically risky proceedings. But the attention goes beyond the constitutional hurdles, and the question of what the ECtHR would probably say after the FCC has decided on the unconstitutionality of the party has been discussed openly and from the beginning it has been included in the assessment of the pros and cons of any possible application. There is no doubt that the FCC itself will as far as it can examine the already existing relevant jurisprudence of the ECtHR and its special focus on the importance of the principle of proportionality and a reduced national margin of appreciation in this area.[170]

27. Do you think that there is any relation between the debate on the ECHR and the national constitutional system for implementation of international law and if so, to what extent?

All the various debates on the ECHR and the ECtHR, notwithstanding all critical remarks on some judgments, have increased knowledge of the meaning of international law in the national legal order and the awareness that national law can no longer be seen in splendid isolation but is firmly embedded in international and supranational contexts. The general preparedness to accept this phenomenon and its further evolution is certainly closely connected to the historical experiences that Germany underwent in the last century. Not going its way alone, but together with other States, and respect for international law, general rules of international law or treaties, belong to the consequences the Basic Law has tried to draw from the world wars and the existence of right and left extremist dictatorships in Germany. The debate on the Convention and the ECtHR has supported this widely shared attitude. The far-reaching preparedness to respect and implement the provisions of the Convention is a reflection of this general view on the one hand and, by the same token, strengthens it on the other.

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[169] BVerfG 18 March 2003, BVerfGE 107, 339.

[170] Cf., e.g., *Refah Partisi and Others v Turkey*, ECtHR 13 February 2003, appl. no. 41340/98 et al.; see also O. Klein, 'Parteiverbotsverfahren vor dem Europäischen Gerichtshof für Menschenrechte', 34 *Zeitschrift für Rechtspolitik* (2001) p. 397.

THE NETHERLANDS

Joseph Fleuren & Janneke Gerards

PART 1 – The status of international law in the national constitutional system

1. Can you briefly characterise your national constitutional system? Please pay attention to matters such as:

- **Character of the state (monarchy, republic, ...)**
- **System of government (parliamentary, presidential, ...)**
- **Character of the constitution (written, unwritten)**
- **System for and extent of separation of powers (both horizontal (trias politica), and vertical (federation vs. unitary state, decentralisation or devolution))**
- **Main sources of fundamental rights**

The territory of the Kingdom of the Netherlands (*Koninkrijk der Nederlanden*) is partly situated in Europe and partly in the Caribbean. The Kingdom has a federal structure: it consists of four autonomous political unities (*landen*): 1) the Netherlands, including the Caribbean islands of Bonaire, Sint Eustatius and Saba; 2) Aruba; 3) Curaçao; and 4) Sint Maarten. The highest constitutional law is the Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*). In addition, each political unity has its own constitution. The constitutions of Aruba, Curaçao and Sint Maarten are called *staatsregelingen*. The constitution of the Netherlands is laid down in the Constitution for the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Nederlanden*). However, the latter constitution is hybrid in nature. It is the constitution of the Netherlands and at the same time a constitution for the Kingdom. This has to do with the atypical structure of the Kingdom. Because the Netherlands form the largest part of the Kingdom, in terms of both territory and population, the most important public bodies of the Netherlands (the King, the Government, the Parliament, the Council of State, and the Supreme Court) also function as public bodies of the Kingdom. For this reason the Charter for the Kingdom of the Netherlands leaves the organisation and the competences of these bodies largely to the Constitution of the Kingdom of the Netherlands. Therefore, to the extent that the Charter leaves the regulation of Kingdom affairs to the Constitution for the Kingdom, the latter contains provisions of constitutional law which apply to the Kingdom as a whole.

The Netherlands itself is a decentralised unitary state, organised on three different levels: the State (i.e. the level of central government), the provinces, and the municipalities. In 2010 the Caribbean islands of Bonaire, Sint Eustatius and Saba each became a public body similar to a municipality and were politically integrated in the Netherlands. The other parts of the Kingdom, viz. Aruba, Curaçao and Sint Maarten, have autonomous status; they are not municipalities, nor are they split up into provinces or municipalities.

The Kingdom of the Netherlands has a parliamentary system of government. Although according to the Constitution the King (who is the Head of State) is a member of the Government, the government's decisions are taken by ministers and secretaries of state, who together form the Cabinet (presided over by the Prime Minister). The Prime Minister, the other ministers and the secretaries of state are accountable to both houses of Parliament (*Staten-Generaal*) for the exercise of their powers. Should the Cabinet or an individual minister or secretary of state lose the confidence of the majority of the 150 members of the Lower House (who are elected by popular vote) then the Cabinet, minister or secretary of state has to resign. It is generally assumed that the same holds when the Cabinet or an

individual minister or secretary of state is faced with a lack of confidence by a majority in the Senate (the 75 members of which are elected indirectly by popular vote).

The procedure for adopting an act of parliament is rather compendious. In principle the Council of State (an independent body of eminent jurists and some former politicians, who are appointed for life by the Government) has to be consulted on every bill. Bills which are submitted to the Lower House, either by one of its members or by the Government, may be amended by the Lower House and will only become acts of parliament after they have been passed by both Houses and ratified by the Government. This affords the Government the power to prevent a private member's bill or an amended bill which is contrary to the national interest or conflicts with international law, from gaining the force of statutory law.

The Constitution for the Kingdom of the Netherlands is rigid in the sense that it is difficult to amend. A bill for its amendment has to be passed by both Houses of the Parliament in two separate readings and it has to be ratified by the Government. At a second reading, which will only take place after new elections have been held for the Lower House, the bill - which at this stage may not be amended by the Lower House - requires a majority of at least two-thirds of the votes cast in both Houses before it can be adopted.

At the same time the Constitution of the Netherlands is flexible towards international law. According to Article 90 of the Constitution the Government shall promote the development of the international rule of law.[1] The Kingdom may even become a party to treaties that are inconsistent with the Constitution, provided such treaties have been approved by both Houses of Parliament with a majority of at least two-thirds of the votes cast (Art. 91(3) Const). So the rigid and time-consuming procedure that has to be followed in case of a revision of the Constitution is no impediment to entering into treaties which depart from the Constitution. However, since the Charter for the Kingdom of the Netherlands does not contain a provision similar to Article 91(3) of the Constitution, it must be presumed that the Kingdom may not become a party to a treaty which departs from the Charter until the Charter is amended.[2]

The Judiciary is independent: judges are appointed for life by the Government and do not have to tolerate any interference from the Executive in pending cases. There are courts of first instance, courts of appeal, special courts of appeal for administrative cases, and a Supreme Court (*Hoge Raad*). The Supreme Court functions as a court of cassation. Its main responsibility is to annul judgments handed down by lower courts in criminal and civil cases which have infringed the law. Furthermore, in criminal matters the Supreme Court has the power to order a retrial in cases where there may have been a miscarriage of justice and in cases where a violation of the ECHR or its Protocols has been found by the ECtHR.[3]

The main sources of fundamental rights in the Netherlands are the Constitution for the Kingdom of the Netherlands and human rights treaties. The most important human rights treaties to which the

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[1] For an analysis of this provision see L.F.M. Besselink, 'The Constitutional Duty to Promote the Development of the International Legal Order: The Significance and Meaning of Article 90 of the Netherlands Constitution', 34 *Netherlands Yearbook of International Law* (2003) pp. 89-138.

[2] *Kamerstukken* [Parliamentary Papers] *I* 1955/56, 4133 (R 19), no. 151, p. 3; ibid., no. 151a, p. 3; *Handelingen* [Parliamentary Proceedings] *I* 1955/56, p. 387; *Kamerstukken I* 1956, 4402 (R 43), no. 7a, p. 2. Cf. J.W.A. Fleuren, 'Verdragen die afwijken van de Nederlandse Grondwet' [Treaties which depart from the Dutch Constitution], in D. Breillat, C.A.J.M. Kortmann and J.W.A. Fleuren, *Van de constitutie afwijkende verdragen* [Treaties departing from the constitution] (Deventer, Kluwer 2002) p. 43 at pp. 77-78. A different view is expressed by the Minister of Foreign Affairs in a letter of 23 May 2002 to the Chairman of the Standing Committee on Foreign Affairs in the Lower House, *niet-dossierstuk* 2001/02 (*Tweede Kamer*), buza020253.

[3] Art. 457 *Wetboek van Strafvordering* [Code of Criminal Procedure].

Kingdom of the Netherlands is a party are the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the European Social Charter (ESC), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC). Courts may also derive fundamental rights from customary law.[4]

2.a. To what extent are the national courts (and/or non-judicial bodies, such as Councils of State) empowered to review the compatibility of acts of parliament and other legislation with the constitution?

As a general rule every Dutch court is empowered to disapply a legal provision or declare such a provision nonbinding if it is in conflict with higher law. There are, however, very important exceptions to this. Under article 120 of the Constitution the courts are prohibited from reviewing the constitutionality of acts of parliament.[5] According to established case law, nor are they allowed to test an act of parliament against the Charter for the Kingdom of the Netherlands or against general principles of (customary) law (*fundamentele rechtsbeginselen*).[6] Furthermore, the power of the courts to disapply national legislation in the event of conflict with international law is limited to self-executing provisions of treaties and of resolutions of international organizations (see question 4).

Every bill submitted to the Council of State for advice will be examined for compatibility with higher law and legal principles, including the Constitution for the Kingdom and the Charter for the Kingdom. However, the Council of State’s opinions on legislative bills are not binding.

2.b. If they are competent to do so, what system of constitutional review is used, i.e.:
- **a system of concentrated review (with a constitutional court having the final say on the interpretation of the constitution)**
- **a decentralised system (where all courts have the power to decide on the constitutionality of acts of parliament)**
- **anything in between?**

All courts are empowered to test all legislation that is not an act of parliament (e.g. government decrees, ministerial decrees, provincial and municipal regulations and by-laws) against the Constitution and against general principles of law. None of them is empowered to test acts of parliament against the Constitution or general principles of law.

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[4] *Hoge Raad* [Supreme Court, HR], 7 November 1986, *NJ* 1987, no. 226 (*Hoogovens*); HR 9 January 1987, *NJ* 1987, no. 928 (*Edamse bijstandsvrouw*), para. 4.4; HR 1 December 1993, *AB* 1994, no. 55 (*Gelijkheidsbeginsel*); HR 15 April 1994, *NJ* 1994, no. 608 (*Valkenhorst*).

[5] A private member’s bill to empower the courts to review acts of parliament for conflict with fundamental constitutional rights, passed its first reading in 2009 (*Staatsblad* [Official Publication Journal, *Stb.*] 2009, no. 120). Its fate at second reading is highly uncertain.

[6] HR 14 April 1989, *NJ* 1989, 469 (*Harmonisatiewet*). However, the courts are allowed to disapply a provision of an Act of Parliament in individual cases because of general principles of law, if this is prompted by extraordinary circumstances of the case at issue, which have not been foreseen by the legislature. This does not prejudice the binding effect of the provision itself. See para. 3.9 of the judgment mentioned.

2.c. If they are competent to do so, is there:

- **a system of a priori review, i.e. review of compatibility before an act is adopted by parliament (e.g. advice by the Council of State)**
- **a system of ex post review**
  If so, what kind of procedures are in place?
- **abstract and/or concrete control of norms by direct appeal?**
- **abstract or concrete control of norms by means of preliminary questions?**
- **a combination of a priori and ex post review?**

Legislative bills are examined by the Council of State for compatibility with the Constitution before they are adopted by Parliament, but the opinion of the Council of State on bills has no binding effect.

3.a. Can you briefly characterise the status of international law (treaties, decisions/resolutions by international organisations, customary international law) in the constitutional order? Do treaties, decisions/resolutions by international organisations and/or customary law form part of the law of the land?

Rules of international law (treaties, resolutions of international organisations and rules of customary international law) are part of the law of the land as soon as they become binding on the Kingdom of the Netherlands. Consequently, each public authority (whether at the level of the central government, a province or a municipality) is obliged to comply with international law.[7] However, only self-executing provisions of previously published treaties and resolutions of international organisations have force of law in regard to natural and legal persons and have priority – in the event of conflict – over national legislation (see question 4). This is not to say that international law which is not laid down in self-executing provisions of treaty law[8] cannot have effects on private persons. It may be taken into account by the courts in order to construe and apply domestic legal rules in a manner that is consistent with international law.[9]

Since non-binding decisions of international organisations do not entail legal obligations for the Kingdom of the Netherlands, they are not considered to be part of the law of the land. For this reason, for example, none of the provisions of the Universal Declaration of Human Rights create rights that individuals may enforce before Dutch courts.[10] However, this does not imply that the courts turn a blind eye to recommendations of international organisations and other instruments of international soft law. Although the courts are not obliged to comply with them,[11] they frequently refer to such instruments when interpreting and applying rules of international law that are actually binding. Especially the recommendations, views and general comments of human rights bodies which have been established to supervise the compliance of state parties with human rights treaties are taken into account when the courts have to interpret and apply those treaties.[12]

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[7] See, e.g., *Koninklijk Besluit* [Royal Decree, KB], 19 February 1993, *AB* 1993, 385; KB 11 September 2007, *Stb.* 2007, no. 347.
[8] In this report 'treaty law' is used as an umbrella term for both treaties and resolutions of international organizations (which are adopted in pursuance of a treaty).
[9] Several examples are discussed in J.W.A. Fleuren, 'Directe en indirect toepassing van international recht door de Nederlandse rechter' [Direct and indirect application of international law by the Dutch courts], *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* No. 131 (2005) p. 69 at pp. 85-98.
[10] HR 7 November 1984, *NJ* 1985, 247, 17 *NYIL* (1986) p. 253.
[11] Cf., e.g., *Afdeling bestuursrechtspraak Raad van State* [Administrative Jurisdiction Division of the Council of State, ABRvS], 22 June 2011, *LJN* BQ8830, para. 2.4.1.
[12] See, e.g., *Gerechtshof 's-Gravenhage* [Court of Appeal of The Hague], 20 December 2007, LJN BC0619, *NJ* 2008, no. 133, upheld by HR 9 April 2010, *LJN* BK4547 (*SGP*); *Voorzieningenrechter Arrondissementsrechtbank Utrecht* [Judge in interlocutory proceedings of the District Court of Utrecht], 6 April 2010, *LJN* BM0846.

3.b. If so, what rank do treaties, decisions/resolutions adopted by international organisations and/or customary international law have in the national hierarchy of norms? Is there some kind of hierarchy?

The legal history of the 1953, 1956 and 1983 amendments to the Constitution shows that law of domestic origin is subordinate to treaty law and customary international law. In the Kingdom of the Netherlands international law outranks national legal rules in the hierarchy of law, including the Constitution.[13]

3.c. If international law is not part of the law of the land, what guarantees are there that the state will comply with its international obligations under treaties, decisions/resolutions by international organisations, or customary international law?

This question is not applicable.

3.d. Do the competent courts apply treaties, decisions/resolutions adopted by international organisations and/or customary international law as such (i.e. as sources of international law) or are they transformed into sources of national law in the process of incorporation? Are there any differences in practical consequences between the different approaches? Or is this a mere academic question without practical consequences?

The courts apply international law (treaties, resolutions of international organisations and customary international law) *as such*. There is no system of transformation.

3.e. Would you characterise your constitutional system as monist, dualist or a hybrid system?

The relationship between Dutch law and international law is *monist*: administrative bodies and the courts are permitted to apply sources of national law as well as sources of international law. Dualist theories according to which the contents of treaties and of resolutions of international organisations have to be incorporated into rules of domestic law before they can be applied by domestic courts and public authorities have never been endorsed by Dutch constitutional law.

Some scholars prefer to label the relationship between Dutch law and international law as *moderate monism* (*gematigd monisme*), because only self-executing provisions of published treaty law both have force of law in regard to natural and legal persons and may prevent the application of national legislation.[14]

4. To what extent and how are the national courts empowered to review the compatibility of the constitution, acts of parliament, lower legislation, and other decisions taken by public authorities with treaties, decisions/resolutions adopted by international organisations and/or customary international law?

According to article 94 of the Constitution, national legislation – including the Constitution, Acts of Parliament and subordinate legislation – is inapplicable if application would be incompatible with self-executing provisions of treaties and resolutions of international organizations, with the proviso that the treaty or resolution in question has been published previously. Whether the national legisla-

[13] J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* [Treaty provisions that are binding on all persons] (The Hague, Boom Juridische uitgevers 2004) pp. 338-340; J.G. Brouwer, 'The Netherlands', in D.B. Hollis, et al., eds., *National Treaty Law and Practice* (Leiden, Nijhoff 2005) p. 482 at pp. 498-499.

[14] Cf. *Kamerstukken II* 2007/08, 29 861, no. 19, p. 3.

tion has come into force before or after the publication of the treaty or resolution is irrelevant. In legal doctrine there is some disagreement on the question of whether the power of review embodied in Article 94 of the Constitution extends to legal rules laid down in the Charter for the Kingdom of the Netherlands.[15]

Although all rules of international law that are binding on the Kingdom of the Netherlands take hierarchical precedence over law of domestic origin (see question 3b), the courts are not permitted to disapply national legal rules, regardless of whether they are embodied in the Constitution, an act of parliament or in subordinate legislation, in the event of conflict with non-self-executing provisions of treaty law or with customary international law.[16]

On occasion a court rules that the treaty provision at issue has not been violated, while deliberately refraining from taking a position on whether this provision is self-executing. However, the courts will not (even in a declaratory judgment) take the liberty of ruling that a provision of treaty law has been violated, even if the provision might not be self-executing.

Since the concept of a self-executing provision of treaty law plays a vital role in the relationship between Dutch law and international law, it may be useful to explain briefly the Dutch approach to defining the notion of self-execution provisions. According to the Dutch Constitution, provisions of treaties and resolutions of international organisations, *which may be binding on all persons by virtue of their content*, shall become binding on all persons (i.e., shall have force of law in regard to all natural and legal persons) after they have been published (Article 93). As soon as such provisions have become binding on all persons, they may prevent the application of national legislation (Article 94). Although the italicised phrase was introduced to limit the scope of Articles 93 and 94 to self-executing provisions of treaty law,[17] they have not been very helpful. In fact, much debate was needed to elucidate the meaning this phrase. In the 1950s and 1960s it was not uncommon to consider the intention of the contracting parties to be decisive in reference to the question of whether a provision of treaty law was self-executing (i.e., directly applicable by the courts). Nowadays this criterion has lost much of its former importance. According to the Supreme Court, the question whether or not the contracting parties intended a provision of treaty law to be self-executing (or to have direct effect) is only relevant when they either clearly wanted the provision to have direct effect, or, to the contrary, clearly agreed that no such direct effect should be given.[18] Except for this situation, the content and wording of the provision is decisive under Dutch law. The accepted standard is that there is no direct effect if the provision entails an obligation on the Dutch legislature to adopt statutory regulations along the lines indicated by the provision. If the provision can in itself operate as law (*objectief recht*) within the domestic legal order, direct effect is accepted. In sum, the test boils down to whether the provision itself contains a legal rule of principle which the courts can apply, or rather binds every state party to enact legislation in order to comply with the provision under consideration.

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[15] For an affirmative answer see Fleuren 2004, *supra* n. 13, pp. 341-342 (with further references); A.B. van Rijn, 'De plaats van Nederland en de Caribische partners in de buitenlandse betrekkingen en de verdragsrelaties van het Koninkrijk' [The place of the Netherlands and the Caribbean partners in the foreign affairs and the treaty relations of the Kingdom], in L.J.J. Rogier and H.G. Hoogers, eds., *50 jaar Statuut voor het Koninkrijk der Nederlanden* [50th anniversary of the Charter for the Kingdom of the Netherlands] (The Hague, Ministry of the Interior and Kingdom Relations 2004] p. 89. For a negative answer see H.G. Hoogers, *De normenhiërarchie van het Koninkrijk der Nederlanden* [The hierarchy of law in the Kingdom of the Netherlands] (Nijmegen, Wolf Legal Publishers 2009) pp. 49-53 (with further references).

[16] HR 6 March 1959, *NJ* 1962, no. 2, 10 *NILR* (1963) p. 82 (*Nyugat II*); HR 18 September 2001, LJN AB1471, *NJ* 2002, no. 559, *ILDC* 80 (NL 2001) (*Bouterse*); HR 8 July 2008, LJN BC7418 (for an English translation see LJN BG1476), *ILDC* 1071 (NL 2008). See also *Kamerstukken II* 2007/08, 29 861, no. 19, p. 4.

[17] See, e.g., *Kamerstukken II* 1955/56, 4133 (R 19), no. 4, pp. 13-15.

[18] HR 30 May 1986, *NJ* 1986, no. 888, 18 *NYIL* (1987) pp. 389-397 (*Spoorwegstaking*); HR 18 April 1995, no. 619.

Dutch courts tend to consider that substantive provisions of treaty law are either self-executing or not. The answer to the question whether or not a provision of treaty law is self-executing (directly applicable; having direct effect) thus depends solely on its content; the legal action or the circumstances of the case at issue are irrelevant. In the past some courts have experimented with a relative or contextual approach,[19] but this has never been generally accepted by the courts.[20] However, the Administrative Jurisdiction Division of the Council of State recently ruled on the question of the extent to which Article 3(1) of the Convention on the Rights of the Child has direct effect (see question 12), which may trigger new experiments.[21]

If they are:
4.a. Are all courts competent to do so (i.e. a decentralised system of judicial review) or is the competence limited to designated judicial bodies (e.g. a constitutional court or the highest courts)?

All courts are empowered to disapply legal rules (whether embodied in the Constitution, an act of parliament or subordinate legislation) in the event of conflict with self-executing provisions of treaties and resolutions of international organisations.

4.b. Are the courts competent to give priority to international law if national law conflicts with treaties, decisions/resolutions adopted by international organisations and/or international customary law? If so:

- **Is this competence based on national (constitutional) law? Or is it inferred from the nature of international law (e.g. the nature of self-executing treaties or the principle of pacta sunt servanda)?**

The power of the courts to disapply legal rules in the event of conflict with self-executing provisions of treaties and resolutions of international organisations is based on article 94 of the Constitution.

- **Which formal competences do the courts have to give such priority (e.g. disapplying national law in the case at issue, declaring national law null and void)?**

Strictly speaking, the power of the courts is limited to refraining from applying - or prohibiting public authorities from applying - legal rules in the specific case presented to it in which such application would contravene self-executing provisions of treaty law. In practice, this may partly or even completely deprive a legal rule of its binding effect, since the courts will usually follow precedent and disapply the rule in all similar cases. The courts have no authority, however, to declare a legal rule null and void if it is in conflict with international law. Only the public organ that adopted the rule has the competence to remove it from the body of law.

- **Is there a difference between priority over legislation/acts of parliament and priority over the constitution?**

No.

[19] A relative approach has been defended on principle by Y. Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis', 26 *Virginia Journal of International Law* (1986), pp. 627-692.
[20] Fleuren 2004, *supra* n. 13, pp. 404-423.
[21] Cf. Hof Den Haag 26 March 2013, *LJN* BZ4871 (*Rookverbod*).

4.c. Does declaring an act null and void have ex tunc effect or ex nunc effect, or is it possible for the court to set a time limit for the legislature to make amendments before the act loses its legal effect?

This question is not applicable.

5. Can parliament and/or the government play a role in determining whether an act of parliament which has been already been enacted and entered into force is compatible with the constitution and/or international law?

The courts are prohibited from reviewing the constitutionality of acts of parliament (art. 120 Const.). In their rulings on the question whether the application of an act of parliament in the case at issue is in conflict with a self-executing provision of a treaty or a resolution of an international organisation, the courts are completely independent of the Government and both Houses of Parliament. Any opinions on the conformity of a (contested) statutory provision with international law which are expressed in parliamentary documents and proceedings may be taken into account by the courts, but are not decisive. The same goes for opinions on the question whether the provision of treaty law at issue is self-executing, which might be expressed in e.g. the Explanatory Memorandum to the bill approving the treaty in question. The final decision rests with the courts.[22]

PART 2 – Competences and techniques of national courts to apply the ECHR (or avoid violations of the ECHR from occurring)

6.a. Do all the substantive provisions of the ECHR (including the various substantive protocols) have direct effect, i.e. are they self-executing/directly applicable?

The Kingdom of the Netherlands is party to the ECHR and its Protocols, except for Protocol No. 7. The substantive provisions of the ECHR and the Protocols to which the Netherlands is a party are considered by the courts to be self-executing. In the past the courts used to rule that Article 13 ECHR was not self-executing,[23] but this case law seems to be outdated.

6.b. To the extent that the substantive provisions of the ECHR and its Protocols are considered to be self-executing / directly applicable / have direct effect, does this ipso facto mean that these provisions result in subjective rights enforceable before the national courts? Or are there any substantive provisions that are considered to be self-executing, but may not result in subjective rights? If so, please give examples.

In 1956 the constitutional clauses laying down that treaties and resolutions of international organizations had force of law in regard to natural and legal persons and prevailed over national legislation, were limited to self-executing provisions of treaties and resolutions of international organizations. The rationale underlying this amendment was the separation of powers. The framers of the 1956 amendment wanted to prevent the courts from having to disapply a national law even in those cases where the treaty or resolution in question did not itself contain any rules which the courts could apply instead of this law. In such cases a legal vacuum might arise which the courts could only fill by

[22] *Kamerstukken I* 1952/53, 2700, no. 63a, p. 3; *Kamerstukken II* 1955/56, 4133 (R 19), no. 7, p. 4; *Handelingen II* 1955/56, p. 800; *Handelingen II* 1979/80, pp. 4433, 4441. Cf. Fleuren 2004, *supra* n. 13, p. 309.

[23] HR 24 February 1960, *NJ* 1960, 483; HR 18 February 1986, *NJ* 1987, 62; *Afdeling rechtspraak van de Raad van State* [Judicial Division of the Council of State, ARRS], 29 July 1980, *Rechtspraak Vreemdelingenrecht* 1980, 46; ARRS 26 July 1983, *AB* 1984, 20.

creating law themselves and thus making choices that should be left to the legislature.[24] Nevertheless, since the 1980s the courts have frequently been confronted with cases in which the removal of inconsistencies between Dutch law and self-executing provisions of the ICCPR and of the ECHR and its Protocols involved political choices that should preferably be made by the legislature.[25]

In practice, whether or not the courts are prepared to rectify any discrepancies between the law embodied in an act of parliament, on the one hand, and a self-executing treaty provision on the other, depends on whether there is a possible solution that fits in with the history and system of the law in question and whether the consequences of the solution are foreseeable. When several solutions are possible and none of them meets this test, the courts tend to refrain from choosing between them. But should the legislature continue to do nothing about the problem, then there may be a point when the courts themselves will provide a solution.[26]

Consequently, the courts are *empowered* to remove any inconsistencies between Dutch law and self-executing provisions of the ECHR and its Protocols, but may sometimes consider it prudent to leave a solution to the legislature, at least pro tempore.[27]

In general, therefore, the self-executing provisions of the ECHR and its Protocols will result in subjective rights enforceable before the national courts, except in those cases where the courts abstain from applying a self-executing provision under the separation of powers doctrine.

6.c. If some of the substantive provisions of the ECHR and its Protocols are considered to be of such a nature that they can only be implemented by means of legislative measures, are the national courts nevertheless competent to apply those provisions to establish state responsibility in cases where those provisions have been violated?

A legal claim against the State or its bodies that is based on state responsibility for violating a provision of a treaty or a resolution of an international organisation will be dismissed by the courts if the provision is non-self-executing, regardless of whether the claimant is demanding a declaratory judgment, claiming damages, demanding an injunction or a court order.[28]

In the event that Dutch law is inconsistent with a self-executing provision of, e.g., the ECHR or its Protocols, but the courts have been reluctant to remove this inconsistency because of the separation of powers doctrine, it may be possible for a victim to obtain a declaratory ruling or be awarded compensation.

If so, which remedies are possible? E.g.:

1) **Are the national courts competent to order the state or its bodies to compensate for the damage caused by violations of non-self-executing provisions of the ECHR and its Protocols?**

No, a claim for damages brought against the state or its bodies will be dismissed by the courts if it is based on a non-self-executing provision of treaty law.

[24] *Kamerstukken II* 1955/56, 4133 (R19), no. 4, pp. 13-14. See also H.F. van Panhuys, 'De regeling der buitenlandse betrekkingen in de Nederlandse grondwet' [Regulating foreign relations in the Netherlands Constitution], *Mededelingen NVIR* No. 34 (1955) p. 28 at p. 50.

[25] See, e.g., HR 12 October 1984, *NJ* 1985, 230; HR 23 September 1988, *NJ* 1989, 740; HR 19 January 1990, *NJ* 1991, 213; HR 16 November 1990, *NJ* 1991, 475; ABRvS 29 October 2003, *LJN* AM5435.

[26] HR 12 May 1999, *BNB* 1999, no. 271 (*Arbeidskostenforfait*).

[27] Cf. S.K. Martens, 'De grenzen van de rechtsvormende taak van de rechter' [The limits of the law making task of the courts], 75 *Nederlands Juristenblad* (2000), pp. 747-758.

[28] Cf. Fleuren 2004, *supra* n. 13, pp. 382-389.

2) Are the national courts competent to order the State to adopt (legislative) measures which are necessary to implement non-self-executing provisions of the ECHR and its protocols?

The courts do not consider themselves competent to order the State or its bodies to adopt an act of parliament or other legislative measures requiring the cooperation of the people's representatives, regardless of whether the claim is based on a self-executing provision of treaty law, another rule of international law, or even a rule of EU law.[29]

7. The case law of the ECtHR includes (positive) obligations on national courts to apply the Convention in relations between private parties (i.e. in horizontal relationships). Courts must refrain from interpreting contractual obligations in violation of the ECHR (Khurshid Mustafa & Tarzibachi, Pla & Puncernau). When deciding on horizontal conflicts between rights (e.g. the right to freedom of expression and the right to respect for one's reputation) they have to take account of the ECHR, and sometimes they are required to interpret national law in a specific manner (e.g. family law cases should always be decided in concreto, taking the best interests of the child into account). Do the national courts indeed apply the relevant ECHR provisions (or the corresponding provisions of the incorporating act) to cases between private parties, in compliance with the case law of the ECtHR?

The Dutch courts do not hesitate to take account of the provisions of the ECHR and the Protocols – as they are construed by the ECtHR – in cases between private parties (horizontal effect). If the ECtHR has construed a provision in such a manner that it imposes on the State Parties an obligation to recognise or ensure rights which individuals should be able to exercise in respect of other persons, then the self-executing nature of the provision will have the effect that the relevant rights and positive obligations recognised by the Court are enforceable before the Dutch courts. E.g., to the extent that according to the case law of the ECtHR Article 8 of the Convention entails the right of access to one's children, one parent may invoke the right to respect for his family life against the other parent before the courts.[30] The ECHR may even affect the interpretation and enforceability of a contract between private parties.[31] However, it is not always clear whether the civil courts apply the ECHR directly in these cases or rather base their judgments on the (often open-ended) clauses of private law, such as clauses on torts and due care, interpreting these in line with the Court's case law (indirect horizontal effect).[32]

The only limitations on the willingness of the courts to apply fundamental rights (as interpreted by the ECtHR) to legal relationships between private persons seem to result from the separation of powers doctrine. An individual cannot successfully invoke the Convention (or, more generally, the fundamental rights principles embodied in the Convention and the ECtHR's case law) – either against

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[29] HR 21 March 2003, *NJ* 2003, 691 (*Waterpakt*); HR 1 October 2004, *NJ* 2004, 679.

[30] See, e.g., HR 22 February 1985, *NJ* 1986, 3. Cf. J. Fleuren, 'The application of public international law by Dutch courts', 57 *Netherlands International Law Review* (2010) p. 245 at pp. 257-258.

[31] E.g. *Rechtbank* [District Court] *'s-Hertogenbosch*, 26 October 2011, *LJN* BU2938, citing ECtHR, judgment of 16 December 2008, appl. no. 23883/06, *Kurshid Mustafa and Tarzibachi v. Sweden*; the district court ruled that Article 10 of the ECHR prevented the enforcement of an (alleged) contractual obligation to remove a satellite dish.

[32] On this, see further M. Claes & J.H. Gerards, 'National report – The Netherlands', in J. Laffranque, ed., The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, Reports of the XXV FIDE Congress Tallinn, Vol. 1 (Tartu, Tartu University Press 2012) pp. 613-677 at pp. 628-633. It is explained here that there are also some other conceivable scenarios that would give horizontal effect to ECHR provisions and the case law of the ECtHR (it is conceivable, for example, that a legislative act governing a horizontal situation can be disapplied for incompatibility with an ECHR provision, and that this would have consequences for the horizontal relationship), but the case described above is the most common one.

another private person or against the State or a public body – in order to close a gap between Dutch law and the Convention if this involves choices which should be left to the legislature.

8. Are there examples of cases in which national legislation or national decisions have been set aside / declared null and void / disapplied because of a conflict with the ECHR?

Yes.

8.a. Can you estimate if this occurs frequently / sometimes / rarely?

It happens quite frequently that a court will disapply subordinate legislation or annul a decision of a public body due to a conflict with the ECHR or its Protocols. Cases in which a court actually disapplies an act of parliament in order to avoid – or to remedy – a violation of the Convention are relatively rare. The vast majority of cases in which the courts have applied the Convention or have otherwise taken the Convention into account, did not require the disapplication of an act of parliament. Nevertheless, such cases may have a powerful impact on the interpretation and scope of statutory provisions.[33]

8.b. If constitutional review is possible: can you estimate if the constitution is used more often / just as often / less often than the ECHR as a basis for holding that legislation or decisions do not comply with fundamental rights norms?

In the Netherlands, the ECHR is used much more often than the constitution as a basis for judicial review in fundamental rights cases, although the courts regularly mention both the ECHR and the constitution (and also international human rights treaties) as relevant sources of law.[34] The actual test applied by the courts is usually that defined by the ECtHR in its case law. The main explanation for this is that the ECHR contains more, and more specific fundamental rights norms than the Constitution, and the Dutch courts can readily rely on interpretations given by the ECtHR. The Dutch constitution contains only a limited number of fundamental rights clauses, which are clearly addressed to the legislature and are not easily applicable by the courts. This explains why, even in cases where the prohibition of constitutional review does not apply (i.e. in all cases in which either subordinate legislation or administrative decisions are at stake), the courts prefer to rely on the ECHR clauses.[35]

8.c. Are there any examples where the court has declined to use its competence to set aside national legislation / decisions in order to respect separation of powers (between the courts and the legislature or between courts and administrative bodies) or the sovereignty of parliament?

In a judgment of 23 September 1988 the Supreme Court had to rule on the legislative provision that a child born out of wedlock shall bear the surname of the father who had acknowledged the child, even if the parents wanted the child to keep the mother's surname. Although the Supreme Court held that

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[33] J.C. de Wit, Artikel 94 Grondwet toegepast. Een onderzoek naar de betekenis, de bedoeling en de toepassing van de woorden 'vinden geen toepassing' in artikel 94 van de Grondwet [Applying Article 94 of the Constitution. A study of the meaning, the intention and the application of the words 'shall not be applicable' in Article 94 of the Constitution] (The Hague, Boom Juridische uitgevers 2012). For an extensive analysis of the case law in this regard, see also J.H. Gerards, 'Oordelen over grondrechten – rechtsvinding door de drie hoogste rechters in Nederland' [Deciding fundamental rights cases – legal reasoning by the three highest courts of the Netherlands], in: H. den Tonkelaar en L. de Groot, Rechtsvinding op veertien terreinen [Legal reasoning in fourteen fields of law], Deventer: Kluwer 2012, pp. 9-51, at p. 31.

[34] For an extensive analysis of the case law in this regard, Gerards 2012, *supra* n. 33, pp. 28-33.

[35] Ibidem.

the relevant provision of the Dutch Civil Code was incompatible with the principle of non-discrimination embodied in article 26 of the ICCPR, it nevertheless refused to disapply the provision. According to the Supreme Court it was up to the legislature to choose between several systems that would guarantee parents the right to determine whether their children shall bear the mother's or the father's surname. When this judgment was handed down, a draft bill had already been introduced to amend the law on surnames. Apparently the Supreme Court did not want to hamper the legislature's activities and therefore chose to exercise restraint.[36] Since 1 January 1998 the law on surnames has been brought into conformity with the principle of non-discrimination.

9. Are the national courts competent to order the national legislature to bring national law into conformity with the ECHR by means of amending or introducing legislation?

No. The courts do not consider themselves competent to order the State or its bodies to adopt or amend acts of parliament or other legislative measures requiring the cooperation of the people's representatives, regardless of whether the claim is based on a self-executing provision of treaty law, on another rule of international law, or even on a rule of EU law.[37]

10. Do national courts strive to interpret national law (including the national constitution) in harmony with the ECHR?

Treaty-consistent interpretation of national law is a frequently used technique in the Dutch courts to avoid a violation of the ECHR, especially when an act of parliament is at issue.[38] The Dutch courts generally apply the standards for review that have been formulated by the ECtHR, thereby avoiding conflicts with ECHR law. For example, in reviewing national measures that limit fundamental rights or interests against European law, the courts test their effectiveness, their necessity and their proportionality in the strict sense, often expressly referring to the necessity test of the ECHR or the requirement of having to strike a 'reasonable balance'.[39] Moreover, the judgments of the ECtHR are closely followed and the choices made by the Strasbourg courts are generally readily adopted.[40]

There are no examples of cases in which courts have expressly refused to apply European standards or balances struck between conflicting rights on the European level, because they would conflict with national (constitutional) values or constitutional rights. On the other hand, it should be stressed that attempts are sometimes made to keep the response to ECtHR case law as minimal as possible. A case in point is the reaction to the *Salduz* judgment.[41] This judgment sparked intense debate over the Court's interpretation of the Convention, and many voiced their profound disagreement with the decision. To meet the concerns of scholars and legal practitioners, the Supreme Court has given a

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[36] HR 23 September 1988, *NJ* 1989, 740 (*Naamrecht*). By then it was established case law that article 26 ICCPR was self-executing.
[37] HR 21 March 2003, *NJ* 2003, 691 (*Waterpakt*); HR 1 October 2004, *NJ* 2004, 679.
[38] See, with many examples, in particular De Wit, *supra* n. 33.
[39] For recent examples, see e.g. ABRvS 14 July 2010, *LJN* BN1135 (*'Jezus redt'* – balancing freedom of religion and expression against planning interests); Hof Den Haag 26 April 2011 (*Iranian students* – balancing non-discrimination rights against national security; application of requirement of 'fit', 'effectiveness' and 'necessity'); *Centrale Raad van Beroep* [Central Appeals Council, CRvB], 21 September 2010, *LJN* BN8775 (*house visits* – balancing privacy interests against interest in combating social security fraud).
[40] See further Claes & Gerards, *supra* n. 32, pp. 641-642.
[41] *Salduz* v. *Turkey*, ECtHR (GC) 27 November 2008, no. 36391/02; see extensively on this debate F.P. Ölçer, 'Schrapping van de rechtmatigheidstoetsing eerste termijn inverzekeringstelling in het wetsvoorstel Rechtsbijstand en politieverhoor. Een mensenrechtelijke quid pro quo, of: de keerzijde van vroege rechtsbijstand?' [Removal of judicial review of the first stage of police custody in the legislative proposal Legal assistance and police interrogation. A human rights quid pro quo, or: the downside of early legal assistance?], *Nederlands Tijdschrift voor Mensenrechten* [Netherlands Journal of Human Rights] 2011, pp. 561-574.

rather minimal reading to the case, decreasing the judgment's impact on Dutch criminal procedure.[42] Moreover, in a recent judgment, the Dutch supreme court set aside an interpretation of Dutch law given by the ECtHR, obviously preferring its own interpretation.[43] According to the ECtHR, the Dutch judicial approach to the issue under consideration (competence to decide on the extension of a 'TBS order', which would allow psychiatric confinement of a dangerous convict) was not in accordance with domestic law, as the ECtHR had interpreted it, and was therefore in violation of Article 5 of the Convention (the right to habeas corpus). Although the Supreme Court did not expressly state that the ECtHR's interpretation was incorrect or mistaken, and although it did not expressly set aside the ECtHR's judgment, it did rule that the relevant provision of domestic law had to be interpreted in a different manner than the ECtHR had done. Thus, the Supreme Court clearly does not always strictly follow the ECtHR's interpretations and does not always interpret national law in line with the ECtHR's judgments.

Cases in which the courts have to avoid a conflict between the Constitution and international law are very rare.[44] Nevertheless, the interpretation and application of a constitutional provision may be influenced by international law. Especially the way in which article 1 of the Constitution (principle of non-discrimination) is interpreted and applied by the courts has been manifestly influenced by article 26 of the ICCPR and article 14 of the ECHR.

11. Do national courts try to avoid conflicts with the ECHR by means of constitutional review or construing national law in conformity with the constitution (Verfassungskonforme Auslegung)?

No, this is never done. The reason is that it is very much accepted that national legislation and national administrative decisions are interpreted in line with the relevant Convention provisions (or disapplied if need be), and that ECHR review is usually preferred over constitutional review (see the answer to question 8b). Even if constitution-consistent interpretation (*Verfassungskonforme Auslegung*) were to be an appropriate and sufficient way to avoid conflicts with the ECHR, the tendency is to apply an ECHR-consistent interpretation instead.

12. Do national courts use EU law as a vehicle to review the compatibility of national law with the ECHR?

Due to article 94 of the Constitution, the courts will normally not have to use EU law as a vehicle to make national law compatible with the ECHR. But occasionally EU law may affect the way the courts deal with human rights provisions. For instance, the Administrative Jurisdiction Division of the Council of State recently referred to article 24 of the Charter of Fundamental Rights of the European Union, in combination with the case law of the European Court of Justice on the enforceability of EU law before the national courts, in order to substantiate a ruling on the question of the extent to which article 3(1) of the Convention on the Right of the Child has direct effect.[45]

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[42] HR 30 June 2009, *LJN* BH3079.
[43] HR 12 February 2013, case no. S 13/00259 CW.
[44] In HR 9 April 2010, *LJN* BK4547 (*SGP*) a possible conflict was avoided between Articles 6 and 8 of the Constitution, on the one hand, and Article 7(c) of the Convention on the Elimination of All Forms of Discrimination against Women, on the other.
[45] ABRvS 7 February 2012, *LJN* BV3716.

13. Is there a preferential order in the use of techniques (i.e. treaty-conform interpretation, setting aside national law, ordering the legislature to amend legislation, constitutional review, *Verfassungskonforme Auslegung*) to avoid violations of the ECHR?

The courts use several techniques to avoid or remedy violations of the ECHR. Which technique a court chooses depends on the case at issue. When an act of parliament is under consideration, the courts will usually prefer a treaty-consistent interpretation or application of this act above a disapplication. The courts have less compassion for subordinate legislation. Although the courts are empowered to test subordinate legislation against fundamental rights in the Constitution as well as against self-executing provisions of human rights treaties, they do not seem to have a preference in advance. Therefore much will depend on the circumstances of the case and the question which of both instruments provides the best protection in the specific case.

PART 3 – Dealing with the judgments and decisions of the ECtHR

14. Do the national courts, when interpreting and applying ECHR provisions, refer to judgments/decisions of the ECtHR?

Yes, they do.

14.a. If so, do they do this standardly / frequently / sometimes / rarely?

The Dutch courts refer standardly to ECtHR judgments and decisions. The courts frequently use the standards that have been developed by ECtHR for particular types of fundamental rights cases.[46] This is illustrated, for example, by many cases relating to defamation and insult, where the ECtHR case law on the topic is consistently cited and where the ECtHR's standards in the field are applied (albeit not always very diligently and precisely).[47] When reviewing national measures or decisions that interfere with fundamental rights or interests against European law, the courts usually test their effectiveness, their necessity and their proportionality in the strict sense, mostly referring explicitly to the necessity test of the ECHR.[48] Nevertheless, it appears that national courts often 'translate' the ECHR standards to standards that are more commonly known in domestic law. If this has been done, the courts tend to refer to their own precedents (in which these standards have been 'translated'), rather than the judgments and standards of the ECtHR.[49]

14.b. Does it make a difference if your state was not a respondent party to the case at hand? I.e., do the courts generally refer to the case law of the Court as a whole (*res interpretata* effect), or is special importance given to the judgments/decisions to which the state has been a party?

This does not make a difference – the Dutch courts refer just as often to ECtHR judgments rendered in cases against other states as in judgments against the Netherlands. Moreover, if the ECtHR has pronounced judgment in a case against another state which may be relevant to similar cases in the

[46] See further Claes & Gerards, *supra* n. 32, pp. 640-642.
[47] For some recent examples, see Hof Amsterdam, 13 October 2009, *LJN* BK0003; HR 18 September 2009, *LJN* BI7191; *Hof Amsterdam*, 8 March 2011, *LJN* BP6989.
[48] For recent examples see ABRvS 14 July 2010, *LJN* BN1135; Hof Den Haag 26 April 2011; CRvB 21 September 2010, *LJN* BN8775.
[49] See further Gerards 2012, *supra* n. 33, pp. 33-36.

Netherlands, the courts will usually try to do justice to the interpretation given by the ECtHR (but see the answers to questions 10, 15 and 16).

15. How do courts respond to judgments of the ECtHR in cases to which the state has been a party?
15.a. What general methods exist for the national courts to respond to such judgments (e.g. reconsidering a case after reopening; changing interpretation of national law in similar cases)?

Article 457 of the Code of Criminal Procedure allows criminal proceedings to be reopened after a judgment in which the Court has found a violation of the Convention. This possibility is limited to the individual applicant who has brought the complaint against the Netherlands before the ECtHR; other persons, even if they find themselves in a legally or factually comparable position, cannot request reopening.[50]

At present there are no provisions for revision or reopening of proceedings in civil and administrative law. In civil law, revision is only possible in situations related to fraudulent behaviour by one of the parties to the case.[51] In administrative law, the General Administrative Law Act provides for revision of final judgments if new facts have become known that would have led to a different outcome if the court had been aware of them (Article 8:88 GALA).[52] Thus far, however, posterior judgments of the ECtHR have not been considered a 'novum' in the sense of this provision.[53]

Another remedy available to successful applicants in Strasbourg is to bring tort proceedings against the state.[54] State liability in these cases is not easily accepted, however: the criterion is that the Dutch courts which dealt with the case in the first place, must have grossly neglected fundamental principles of law.[55] If the court accepts state liability for the damage effected by the violation, this may result in an obligation on the state to pay compensation, but the applicant may also request, for example, immediate release from prison.[56]

Finally, it is possible for courts to change their interpretation of national law in accordance with a new judgment of the Court, and in fact this often occurs. Over time, for example, Dutch courts have introduced systems to offer compensation in case of delays in judicial proceedings in response to judgments of the ECtHR.[57] Other changes to national case law in response to ECtHR judgments (both

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[50] See further T. Barkhuysen and M.L. van Emmerik, 'Rechtsherstel bij schending van het EVRM in Nederland en Straatsburg' [Legal remedies in case of ECHR violations in the Netherlands and Strasbourg], 31 *NJCM-Bulletin* (2006), pp. 39-64, at p. 59.
[51] In civil law, the grounds for revision are limited to cases of fraudulent behaviour; see Article 382 *Wetboek van Burgerlijke Rechtsvordering* [Code of Civil Procedure].
[52] See Article 8:88 *Algemene wet bestuursrecht* [General Administrative Law Act].
[53] See R.J.N. Schlössels and S.E. Zijlstra, *Bestuursrecht in sociale rechtstaat* [Administrative Law in the Social Welfare State] (Deventer, Kluwer 2010) p. 1344 (para. 24.120). However, judgments of the ECtHR can possibly be considered as new and relevant facts ('nova') for another provision of the General Administrative Law Act, i.e. Article 4:6. Based on that provision, an individual can request the competent administrative body to revise an administrative decision (or take a new decision) because new relevant facts have become known. Given that this possibility does not involve the courts, however, it is not discussed further here. See e.g. R. Stijnen, *Rechtsbescherming tegen bestraffing in het strafrecht en het bestuursrecht: een rechtsvergelijking tussen het Nederlandse strafrecht en bestaffende bestuursrecht, mede in Europees perspectief* [Legal protection against punishment in criminal law and administrative law: A legal comparison between the Dutch criminal law and punitive administrative law, also in European perspective] (Deventer, Kluwer 2011) at p. 724-725 and Barkhuysen and Van Emmerik, *supra* n. 50, p. 55.
[54] Based on Article 6:162 *Burgerlijk Wetboek* [Civil Code]; see further Barkhuysen and Van Emmerik, *supra* n. 50, p. 57.
[55] HR 1 February 1991, *NJ* 1991, 413; see also HR 18 March 2005, *NJ* 2005, 201; see further Barkhuysen and Van Emmerik, *supra* n. 50, p. 56-57.
[56] E.g. HR 31 October 2003, *NJ* 2005, 196.
[57] See e.g. HR 17 June 2008, *LJN* BD2578; ABRvS 26 March 2008, *LJN* BC7604; CRvB 23 January 2008, *LJN* BC2942.

against the Netherlands and other states) are visible in relation to youth detention,[58] the application of the *lex mitior* principle,[59] the use of evidence from witnesses who could not be questioned at trial,[60] and numerous other cases.[61]

15.b. Do national courts generally comply with the ECtHR's judgments?

Yes they do, but see the answers to questions 14.a and 16.b, which are also relevant to judgments against the Netherlands.

15.c. Do national courts try to adapt or limit the effect of the Court's judgments, e.g. by adapting the Court's interpretation to fit in as far as possible with the national legal system and the national legal traditions?

Although the Dutch courts generally loyally and carefully apply the ECtHR case law and the ECHR standards, they may sometimes give minimalist readings to the Strasbourg judgments and they may silently and implicitly change and adapt standards to fit in with their own traditional, well-accepted case law approaches (see also the answer to question 16.b). In particular, two recent judgments of the criminal chamber of the Supreme Court may serve to illustrate this.

The first judgment concerned a case that was similar to one that was decided on by the ECtHR in 2012, i.e., *Vidgen v. the Netherlands*.[62] Both cases related to the right to a fair trial in cases where witness statements were used as evidence without there being full possibility for the defence to question the witnesses at trial. The ECtHR held in *Vidgen* that the Dutch rules in this respect were too restrictive and harmed the interests of the defence, in violation of Article 6. In its post-*Vidgen* judgment, the Supreme Court explicitly recognised that the approach it had hitherto followed could no longer be maintained.[63] It therefore changed its settled case law to make it consistent with the requirements following from the ECtHR's judgment. Nevertheless, the Supreme Court's reading of the Strasbourg case law is arguably relatively restrictive. For example, it stressed the possibilities for exceptions to the rules defined by the ECtHR, thereby implying that it would be ready to use them in future cases. Thus, even if the Supreme Court closely followed the ECtHR's interpretation in this judgment, it did so in a minimal way.

In another recent judgment, the Dutch Supreme Court took a bolder approach by actually setting aside an interpretation of Dutch law given by the ECtHR in a case against the Netherlands.[64] According to a judgment rendered by the ECtHR in the case of *Van der Velden v. the Netherlands*, the Dutch judicial approach to the issue in question (i.e., the competence to decide on the extension of a 'TBS order', which would allow psychiatric confinement of a dangerous convict) was not in accordance with domestic law as interpreted by the ECtHR, and therefore in violation with Article 5 of the Convention (the right to habeas corpus).[65] Although the Supreme Court did not expressly state that the ECtHR's interpretation was incorrect or mistaken, and although it did not expressly set aside the ECtHR's judgment, it did rule that the relevant provision of domestic law had to be interpreted in a different manner than the ECtHR had done.

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[58] HR 24 June 2011, *LJN* BQ2292, in response to *S.T.S.* v. *the Netherlands*, ECtHR 7 June 2011, appl. no. 277/05.
[59] HR 12 July 2011, *LJN* BP6878, in response to *Scoppola* v. *Italy*, ECtHR (GC), 17 September 2009, appl. no. 10249/03.
[60] HR 29 January 2013, *LJN* BX5539.
[61] For more examples, see Gerards 2012, *supra* n. 33, p. 32.
[62] ECtHR 10 July 2012, appl. no. 29353/06.
[63] HR 29 January 2013, *LJN* BX5539 at para. 3.3.3.
[64] HR 12 February 2013, case no. S 13/00259 CW.
[65] ECtHR 31 July 2012, appl. no. 21203/10.

Hence, the (criminal chamber of the) Supreme Court does not always strictly follow the ECtHR's interpretations. Both judgments demonstrate that it may even be reluctant to slavishly follow ECtHR precedents. Nevertheless, it must be stressed that in most cases, such restraint is invisible. Especially the other (highest) courts seem to be more eager to adapt their interpretations to Strasbourg case law. Since this is most visible in relation to judgments against other states than the Netherlands, this is discussed more extensively in the answer to question 16.

16. How do courts respond to judgments/decisions of the ECtHR in cases to which the state has not been a party?
16.a. Do the national courts apply a strict 'mirror principle' approach, i.e. do they apply the Court's interpretations as carefully and strictly as possible without offering more or less protection to fundamental rights?

Indeed, the Dutch courts tend to adopt a 'mirror principle' approach. In a 2001 judgment, the Supreme Court accepted that Article 53 ECHR allows the national authorities to provide a higher level of protection of fundamental rights than is prescribed by the Convention.[66] It concluded, however, that Article 94 of the Constitution did not allow it to accept such additional protection if this did not follow directly from a judgment of the ECtHR, i.e., if there were no decision of an international organisation that it could use as a basis to declare national legislation incompatible with international law.[67] In the absence of a clear ECtHR judgment, the Supreme Court held that it would be up to the legislature to decide if a level of protection exceeding that required by the ECtHR should be provided. Given that this is well-established case law, in effect the Dutch courts will not provide more protection than is strictly mandated by the ECtHR.

Vice versa, the Dutch courts will strive not to fall below the level of protection demanded by the Strasbourg Court. To the extent possible they will interpret national law in line with the judgments of the ECtHR, they will disapply national legislation that is not in conformity with the ECHR, and they will declare administrative decisions violating the Convention null and void. Simultaneously, it must be recalled that the Dutch courts will be reluctant to do so if they find that meeting the demands of Strasbourg requires political choices to be made (which should be made by the legislature, see the answer to question 6.b). In addition, they sometimes give a minimal or a rather creative reading of a Strasbourg judgment to make it fit in with the Dutch legal system (see the answer to question 15.b).

16.b. Do the national courts (sometimes) provide more protection to fundamental rights, e.g. by consciously applying national constitutional provisions or interpreting the ECHR provisions in a more protective manner?

In the past some scholars have suggested that the Dutch courts were at liberty to construe the ECHR provisions in a manner that would deliberately exceed the level of protection guaranteed by the

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[66] HR 10 August 2001, *NJ* 2002, 278.

[67] See para. 3.9: '[...] Article 53 of the Convention allows the national legislator the freedom to provide more far-reaching protection than is afforded by the provisions of the Convention. However, the Dutch courts are bound by Article 94 of the Constitution, under which statutory regulations in force within the Kingdom are not applicable if such application is in conflict with the provisions of treaties or of decisions by international institutions that are binding on all persons. Such an incompatibility cannot be assumed solely on the basis of an interpretation by the national (Dutch) courts of the term family life in the light of recent legislation, which results in a more far-reaching protection than can be assumed on the basis of the case law of the European Court of Human Rights in relation to Article 8 of the Convention' (translation taken from *NYIL* (2004) p. 441 at p. 446).

ECtHR,[68] but, as mentioned in the reply to question 16.a, this doctrine has been rejected by the Supreme Court. Moreover, the answer to question 15 demonstrates that the Supreme Court sometimes opts for as minimal an interpretation as possible.

This is not to say that the courts are always conservative in interpreting and applying the Convention. Accepting that the ECHR is a living instrument and that fundamental rights are continually evolving, they will sometimes develop a very protective fundamental rights interpretation, even if this is not yet fully supported by the case law of the ECtHR.[69] In addition, it may happen occasionally that a court, without a clear basis in the rulings of the ECtHR, uses the ECHR to remedy a legal vacuum or a legal consequence that is considered to be inappropriate. [70]

16.c. Do national courts try to adapt or limit the effect of the Court's judgments/decisions, e.g. by adapting the Court's interpretation to fit in as much as possible with the national legal system and the national legal traditions?

As was already mentioned in the answer to questions 10 and 15, the Dutch courts may sometimes respond reluctantly to the Court's interpretations, especially if an ECtHR judgment is difficult to fit into Dutch law or if it has sparked controversy. As mentioned in the reply to question 10.b, an example is the response to the *Salduz* judgment of the ECtHR. In this judgment the Court held that Article 6 ECHR required that a suspect be assisted by a lawyer during police interrogation.[71] Since such assistance during the police interrogation is not common practice in the Netherlands, the judgment was understood as containing an obligation to change national policy. The judgment provoked intense debate between legal scholars, practitioners and politicians, which revealed clear disagreements with the Court's judgment and its consequences for national law. To meet the concerns expressed by scholars and legal practitioners, the Supreme Court gave a rather minimalist reading to the judgment, changing national law only slightly.[72] It is still not certain if this approach would be considered by the ECtHR to be in conformity with the Convention.

In addition, as mentioned in the answer to question 14.a, there are many examples of Dutch case law in which the ECHR standards are expressly mentioned and seemingly obediently applied, but in which the courts actually give their own interpretation of such standards.[73] As a result, there may be minor nuances and deviations in the application of European standards, which makes them fit better into the Dutch legal system and legal tradition.

17. How do courts deal with the ECtHR's margin of appreciation doctrine?
17.a. Do they apply the margin of appreciation doctrine in the same way as is done by the ECtHR?

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[68] See, e.g., E. Myer, 'Dutch interpretation of the European Convention: a double system?, in F. Matscher and H. Petzold, eds., *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J. Wiarda*' (Köln, Heymanns 1988) pp. 421-430.
[69] See, e.g., HR 28 March 2008, *LJN* BC2255.
[70] See, e.g., HR 8 July 2005, *LJN* AO9273, para. 3.6: 'It should be noted that the right which is laid down in Art. 6(1) ECHR is conferred on everyone by this provision, therefore also on public bodies' (our translation).
[71] *Salduz* v. *Turkey*, ECtHR (GC) 27 November 2008, appl. no. 36391/02; see extensively on this debate Ölçer, *supra* n. 41.
[72] HR 30 June 2009, *LJN* BH3079.
[73] This is visible, for instance, in the field of freedom of expression; see e.g. Hof Amsterdam, 13 October 2009, *LJN* BK0003 (application of Article 10 ECHR, but without express reference to the relevant ECtHR case law); HR 16 June 2009, *LJN* BG7750 (rather 'loose' application of standards derived from the ECtHR's case law); HR 18 January 2008, *LJN* BB3210 (idem).

In the Netherlands, all courts often mention this doctrine, copying the approach taken by the ECtHR.[74] They hold, for example, that because the ECtHR has left a wide margin of appreciation to the states in a certain type of case (e.g. cases relating to social security or environmental law), their own review of the reasonableness or justifiability of an interference with a fundamental right should be restrained, too.[75] Usually, the Dutch application of the margin of appreciation doctrine results in highly deferential judicial review of legislation or administrative decisions. It only rarely occurs that courts apply strict review because the courts find that the ECtHR's case law only permits a narrow margin of appreciation.[76]

17.b. If so, do the courts make careful use of the doctrine, or do they sometimes opt for an overly narrow or overly wide margin of appreciation?

It seems that, in general, the Dutch courts carefully copy the approach taken by the ECtHR and do not accept a wider or a narrower margin of appreciation than is provided in the Court's case law. However, it is questionable whether the approach taken by the Dutch courts is compatible with the margin of appreciation doctrine as such, given the special function the doctrine has in the Strasbourg case law. Since it mainly is an instrument for the Court to define its own judicial review of national decisions, considerations relating to the position of the national authorities (e.g. the 'better placed' argument mentioned in the ECHR report) may influence the scope of the margin of appreciation. Accordingly, the Court may leave a wide margin of appreciation to the states because it feels that national authorities are better placed to assess the necessity or suitability of certain decisions. This does not automatically imply, however, that *national* courts are less well-placed to assess such decisions. Indeed, especially in cases where national courts have to assess whether administrative decisions are compatible with the Convention, i.e. if administrative bodies have exercised their discretionary powers in conformity with fundamental rights, the tendency to always leave a wide margin of appreciation (because such a wide margin is permitted by the Court) may result in a judicial review that is less strict and searching than the circumstances of the case might warrant.

18.a. How intensely do courts review legislation and/or administrative decisions on conformity with the ECHR? Do they always opt for marginal / deferential review (test for manifest violation) or can the scrutiny be more strict?

The review applied by the Dutch courts varies in its intensity: it can be strict or restrained. Generally, two different 'levels' of intensity appear to be used: 'strict' or 'full' review (*volle toetsing*) and deferential review (*marginale toetsing*). An intermediate version is sometimes also apparent, but this is not an 'official' category. In many cases, however, especially in civil law cases in which the conformity of legislation with ECHR rights is reviewed, the courts do not pay explicit attention to the intensity of their review.[77] It is then difficult to know whether intensive review, deferential review, or some kind of intermediate review has been applied. Moreover, in purely civil law cases, in which fundamental rights are applied indirectly by reading them into the open-ended clauses of the Civil Code, there is no clear variation in intensity of review. It seems that such variation only occurs if the case necessitates judicial review of either administrative decisions or legislation. This can be explained by the fact that, in such cases, considerations of separation of powers and (indirect) democratic legitimacy are most relevant to defining the court's position and competences.

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[74] See further on this Gerards 2012, *supra* n. 33, pp. 37-48.
[75] For some examples, see HR 2 October 2009, *LJN* BI1909; ABRvS 14 July 2010, *LJN* BN1135; CRvB 5 August 2011, *LJN* BR4785.
[76] See e.g. ABRvS 3 September 2008, *LJN* BE9698; CRvB 15 July 2011, *LJN* BR1905.
[77] For an example, see HR 27 May 2005, *LJN* AS7054, *NJ* 2005, 485.

If there is clarity as to the level of intensity of review, this is mainly reflected in the test of proportionality of an interference with fundamental rights. If strict review is applied, the reasons for interfering with a fundamental right must be very convincing and weighty; the necessity and suitability of the means chosen are reviewed (although not always) and the reasonableness and proportionality of sanctions are strictly assessed. If deferential review is chosen, the courts tend to use a standard of arbitrariness: an administrative decision or legislative act will only be considered to be in violation of a fundamental rights provision if it is manifestly unreasonable.[78] In practice, such manifest unreasonableness is hardly ever established.[79]

18.b. If strict scrutiny is possible, which standards or factors determine the intensity of the courts' review?

In administrative law, the intensity of review is very much determined by the way the powers of the competent administrative bodies are defined. If the legislature aimed to offer wide discretionary powers to an administrative body (i.e. by indicating that it is up to the administrative body if and when a certain power can be used), the administrative courts usually exercise restraint. It is then considered that administrative bodies are better suited to determining and evaluating relevant facts and that they have greater legitimacy than the courts to take policy decisions.[80] If, by contrast, the administrative body has no such discretion, the courts have more opportunity to test their actions for conformity with the relevant legislation and fundamental rights provisions, resulting in stricter review.[81] In particular, there is no discretion (and therefor 'full' review) in case of interpretation of statutory law and establishment of facts.[82] Such strict review is, moreover, almost always apparent in cases relating to punitive sanctions (e.g. administrative fines).[83] In practice, however, judicial review of administrative decisions is mostly highly deferential; the standard is that of arbitrariness.[84]

If courts (civil, administrative or criminal) are asked to review legislation for its conformity with fundamental rights provisions (in particular the ECHR), the intensity of their review is generally determined by the margin of appreciation that the ECtHR tends to leave on certain topics, as well as by considerations of the relationship between and the respective roles of the courts and the legislature. Indeed, the courts often consider that the legislature is better placed to make difficult balances of interests and take political decisions than the courts, and that it has the primary responsibility and legitimacy to do so; consequently, judicial review of legislation should generally be deferential.[85] Moreover, in many cases where the ECtHR has left a wide margin of appreciation, the Dutch courts

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[78] ABRvS 9 May 1996, *AB* 1997, 93 (*Maxis-Praxis*). See further e.g. B.W.N. de Waard,' Marginale toetsing en evenredigheid' [Deferential judicial review and proportionality], in: *Getuigend staatsrecht. Liber Amicorum A.K. Koekkoek* (Nijmegen: Wolf Legal Publishers 2005) at p. 369. For more detail, see also J.H. Gerards, 'Het evenredigheidsbeginsel van art. 3:4 lid 2 Awb en het Europese recht' ['The proportionality principle of Article 3:4 GALA and European law], in T. Barkhuysen, W. den Ouden and E. Steyger, eds., *Europees recht effectueren. Algemeen bestuursrecht als instrument voor de effectieve uitvoering van EG-recht* [Effectuating European Law. General administrative law as instrument for the effective execution of EC law] (Alphen aan den Rijn, Kluwer 2007) pp. 73-113 at p. 108.
[79] Ibidem.
[80] See expressly ABRvS 9 May 1996, *AB* 1997, 93 (*Maxis-Praxis*).
[81] See in particular E. Helder and R.J. Jue, 'Belangenafweging in het bestuursrecht' [Balancing in administrative law], *Bestuurswetenschappen* 1987, p. 25-41 and W. Duk, 'Beoordelingsvrijheid en beleidsvrijheid' [Factual and policy discretion], *RM Themis* 1988, p. 156-169. See for a more recent overview Schlössels and Zijlstra, *supra* n. 53, p. 408-413.
[82] Schlössels and Zijlstra 2010, *supra* n. 53, p. 409.
[83] There is some debate on 'automatic' sanctions, such as are visible in systems where either a legislator (in an act, decree or regulation) or an administrative body (in by-laws) has created categories of behaviour that attract certain sanctions. It now seems to be accepted that the courts may also assess the reasonableness of imposing such sanctions, but there is still some uncertainty surrounding the issue. On this, see Schlössels and Zijlstra, *supra* n. 53, pp. 414-416.
[84] See further Gerards 2007, *supra* n. 78, p. 109.
[85] See e.g. HR 10 November 2000, *NJ* 2001, 187; ABRvS 20 July 2005, *LJN* AT9708; CRvB 15 May 1995, *RSV* 1996, 170.

simply copy this approach. Accordingly, for example, since the ECtHR generally leaves a wide margin of appreciation to the states in matters of planning policy, social security, environmental law, immigration and asylum law and property law, the Dutch courts do so too.[86] Similarly, as mentioned before (see answer to question 17), the Dutch courts will intensify their scrutiny if the case concerns a subject where the ECtHR only allows a narrow margin of appreciation, as, for example, in cases concerning discrimination on suspect grounds (e.g. nationality)[87] or family law cases. Finally, as mentioned above, in many of these cases the courts do not pay express attention to the intensity of their scrutiny – they simply apply the ECHR standards without referring to any margin of appreciation or discretion for the legislature.[88]

It only rarely occurs that other considerations than those mentioned above influence the intensity of review. In some discrimination cases the courts have chosen less intensive review because the discrimination was not based on one of the grounds explicitly mentioned in Article 1 of the Constitution or Article 14 of the Convention;[89] sometimes the courts intensify their review because of the severity of a certain breach of fundamental rights;[90] and sometimes their review is stricter because of the importance of the fundamental right concerned (e.g. the right to access the court)[91].

Generally, it does not seem that higher courts apply stricter review than lower courts. Differences may occur in individual cases, and they may also depend on the subject matter the courts usually deal with, but such variations do not reflect a principled and fundamental difference in approach between higher and lower courts, or between different highest courts (e.g. the highest courts for tax cases (the Supreme Court), for cases on environmental issues and immigration law (the Administrative Jurisdiction Division of the Council of State) and for cases on social security law (the Central Appeals Council)).

18.c. If the courts can only find a violation of the Convention if it is manifest, it is conceivable that less manifest violations are accepted (so it is conceivable that the ECtHR would still find a violation if it had to decide on the case). If that were to occur, do you think the courts would accept this or would the courts then have recourse to other means to avoid a conflict with the Convention?

This is not relevant for The Netherlands, since intensive review is possible and is sometimes applied. The only (more theoretical) question that might be raised here is if the Dutch courts apply the Court's margin of appreciation too strictly, even leaving a wide margin of appreciation where (if other standards were applied) a stricter assessment would be reasonable. On this, see the answer to question 17.

19. Do the courts make use of special interpretative techniques used by the ECtHR, such as evolutive interpretation (interpretation 'in the light of present day conditions') or consensus interpretation? If so, can you estimate if they do so standardly / frequently / sometimes / rarely?

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[86] For some examples, see HR 20 March 2009, *LJN* BG9951; HR 2 October 2009, *LJN* BI1909; ABRvS 17 March 2010, *LJN* BL7842; CRvB 5 August 2011, *LJN* BR4785.
[87] See, for example, CRvB 15 July 2011, *LJN* BR1905.
[88] E.g. HR 27 May 2005, *LJN* AS7054, *NJ* 2005, 485.
[89] E.g. CRvB 4 November 1993, *AB* 1994, 213.
[90] E.g. ABRvS 3 September 2008, *LJN* BE9698, *AB* 2008, 335.
[91] For this example, see HR 30 September 1992, *NJ* 1994, 495, about the level of court fees; the judgment is rather implicit, though.

The Dutch courts pay relatively little attention to the determination of the scope of fundamental rights provisions, and, accordingly, they do not often explicitly mention methods and techniques of interpretation. Instead, they usually simply hold that a certain ECHR provision does (or does not) apply, referring to their own previous judgments on the matter or to the judgments of the ECtHR.[92] The Dutch courts thereby may simply acknowledge and apply new interpretations provided by the ECtHR (which may be based on consensus or evolutive interpretation), without referring to the interpretative principles and methods on which the interpretation is based.[93] In particular, the method of consensus interpretation is not used in the way the ECtHR uses it. Although the courts may refer to foreign case law or legislation as sources of inspiration,[94] they hardly ever rely on an 'emerging consensus' or the need to respect 'present day conditions' to underpin a novel interpretation of the Convention or the Constitution. Indeed, this is rather logical, given the 'mirror principle' that is applied by the Dutch courts (see above, answer to question 14). This implies that the courts will carefully follow and apply the Strasbourg interpretations, but they will not try to outpace the ECtHR by adopting a more far-reaching interpretation themselves. This approach reduces the need to rely on strongly evolutive techniques of interpretation, and encourages a direct reliance on Strasbourg case law rather than providing independent ECHR interpretations.

Exceptionally, some courts use meta-teleological interpretation, referring to the underlying aims and principles of the ECHR to underpin a certain judgment. This is apparent in a special line of case law of the Central Appeals Council granting extraordinary benefits to particularly vulnerable groups of (illegal) immigrants. The Central Appeals Court grounded its decisions in these cases not only on references to case law of the ECtHR, but also on references to the 'very essence' of the ECHR, mentioning in particular the principles of human dignity and personal autonomy.[95]

20. Is the role and position of the ECtHR debated in your country? If so:
20.a. Where is the criticism mainly visible (media, politics, scholarship, court room)?

In the Netherlands, critical debate about the Court appears to have started with an opinion by a young academic, Thierry Baudet, who criticised the Court in a quality newspaper for being overly intrusive and violating national sovereignty.[96] This opinion sparked a heated debate on the Court's legitimacy, which was partly conducted in the media and academia, and partly in the political arena. Many scholars wrote opinions and contributions, both in the national newspapers (mostly quality newspapers, such as *NRC Handelsblad*, *de Volkskrant* and *Trouw*) and academic journals, either defending the Court or stressing its lack of legitimacy.[97]

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[92] In more detail, see Gerards 2012, *supra* n. 33.
[93] Ibidem.
[94] On this, see in particular E. Mak, *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford, Hart, forthcoming), Chapter 5.
[95] For some examples, see CRvB 22 December 2008, *LJN* BG8776; CRvB 20 October 2010, *LJN* BO3581; CRvB 4 August 2011, *LJN* BR5381.
[96] T. Baudet, 'Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie' [The ECtHR greatly interferes with democratic principles], *NRC Handelsblad* 13 November 2010.
[97] The most important contributions to the debate are J. Peters and L.-A. Kapper, 'Eurohof beschermt tegen overheid, maar Nederlandse rechters volgen EHRM veel te slaafs' [Euro court protects against the state, but Dutch judges are too obedient], *NRC Handelsblad* 15 November 2010; B. Oomen, 'Versterk liever de Grondwet dan kritiek te leveren op het Hof' [Strengthen the Constitution instead of criticising the Court!], *de Volkskrant* 24 November 2010; M. de Werd, 'Uit Straatsburg komt veel goeds' [Much good comes from Strasbourg], *de Volkskrant* 1 December 2010; S. Dimitrov, 'Straatsburgs hof ondermijnt de soevereiniteit van de lidstaten' [Strasbourg Court undermines member states' sovereignty], *NRC Handelsblad* 9 December 2010; T. Zwart, 'Bied dat mensenrechtenhof weerwerk' [Counterbalance that human rights court!], *NRC Handelsblad* 17 January 2011; R.A. Lawson, 'Het Mensenrechtenhof beschaaft Hongarije en Griekenland' [The human rights court civilises Hungary and Greece], *NRC Handelsblad* 25 January 2011; S. Wynia, 'Losgezongen' [Broken free], *Elsevier* 27 January 2011; T. Baudet, 'Brits verzet tegen het Europees Hof is terecht' [The British are right to resist the European Court], *NRC Handelsblad* 14 February 2011; T. Baudet, 'Crucifixen in klaslokalen, adoptie, verbod op kraken…; Wat heeft dit nog te maken met 'univer-

In the political arena, in particular members of parliament for the liberal party (VVD) and the populist party for freedom of Geert Wilders (PVV) (who supported the minority government of VVD and CDA (the Christian democrats) at the time) criticised the Court. At the time, the Dutch position for the intergovernmental conference on the future of the ECtHR (the Brighton conference in April 2012) was being debated. In October 2011, the Dutch Cabinet presented a cabinet view to parliament, in which it argued that the Court should take more care to act in line with the principle of subsidiarity and should be encouraged to leave a wider margin of appreciation to the states.[98] In addition, the Cabinet made a number of proposals to enhance the future effectiveness of the Court which seemed to have a negative impact on the individual right of complaint, such as proposals to sanction lawyers bringing unwarranted claims and restricting the possibility for the Court to impose interim measures under Rule 39. These proposals were hotly debated in parliament; they seemed to have the support of a majority of the Lower House (*Tweede Kamer*), but they were strongly criticised by a majority of the Senate (*Eerste Kamer*).[99] After several debates in early spring 2012, the Cabinet softened its position in response to the criticism raised by the Senate and it took a relatively mild stance in the Brighton conference.[100] After the conference, however, significant new developments occurred: the Rutte-I Cabinet fell in April 2012 and a new coalition Cabinet was formed (consisting of the liberal party VVD and the social-democratic party PvdA) after parliamentary elections of September 2012. In the elections the PVV lost much of its previous support and the electoral debates centred on the economic crisis, expenditure cuts and the future of the European Union. The debate seemed to lose part of its

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sele mensenrechten'? Terecht protesteren de Britten tegen de tentakels van Straatsburg' [Crucifixes in classrooms, adoption, prohibition of squatting…; Does this still have anything to do with 'universal human rights'?], *NRC.Next* 15 February 2011; J.P. Loof, 'Lees eerst eens goed wat het EHRM zegt' [Please read what the Court says first], *NRC Handelsblad* 24 February 2011; S. Blok & K. Dijkhoff, 'Leg het Europees Hof aan banden' [Bridle the European Court!], *de Volkskrant* 7 April 2011; E. Dommering, W. Hins, R.A. Lawson, J. Peters, 'Met Europees Verdrag voor Mensenrechten is niets mis' [There is nothing wrong with the European Convention], *de Volkskrant* 11 April 2011; T. Spijkerboer, 'Het Hof in Straatsburg blijft cruciaal' [The Strasbourg Court retains its crucial function], *NRC Handelsblad* 31 January 2012; T. Zwart, 'Politici kunnen problemen van het Hof oplossen' [Politicians can solve the Court's problems], *NRC Handelsblad* 31 January 2012. Contributions to the debate can also be found in the Dutch Human Rights Law Journal (*Nederlands Tijdschrift voor de Mensenrechten* (*NTM/NJCM Bulletin*)) 2010 (35-8), p. 975ff and 2011 (36-1) and in the Dutch Law Journal (*Nederlands Juristenblad*, *NJB*) (E. Hirsch Ballin, 'De rechtsstaat: wachten op een nieuwe dageraad?' [The *Rechtstaat*: waiting for a new dawn?], *NJB* 2011 (2), pp. 71-73; J.H. Gerards,'Waar gaat het debat over het Europees Hof voor de Rechten van de Mens nu eigenlijk over?' [What is the debate on the ECtHR really about?], *NJB* 2011 (10), pp. 608-612; T. Baudet, 'Dik of dun?' [Thick or thin?], *Recht der werkelijkheid* 2011 (2), pp. 74-79; J.H. Gerards, 'De waarde van een Europees mensenrechtenhof' [The value of a European human rights court], *Recht der werkelijkheid* 2011 (2), pp. 65-73; T. Spijkerboer, 'Het debat over het Europese Hof voor de Rechten van de Mens' [The debate about the ECtHR], *NJB* 2012 (4); T. Spronken, 'Het EHRM in dialoog' [The ECtHR in dialogue], *NJB* 2012 (7), p. 443; G.J.M. Corstens & R. Kuiper, 'Help! Het EHRM verdrinkt!' [Help! The ECtHR is drowning!], *NJB* 2012 (10), p. 667). See also the contributions by Tom Zwart (in: *Onbetwistbaar recht* [Indisputable law], Teldersstichting (113), January 2012) and the Dutch ECtHR judge Egbert Myjer (B.E.P. Myjer, *Het leest als een boek* [It reads like a book], Nijmegen: WLP 2011).

[98] Cabinet letter to the Parliament of 3 October 2011, *Kamerstukken II* 2011/12, 32735, no. 32.

[99] For the debates in the Senate, see *Handelingen I* 2010/11, no. 25, pp. 2-30, 42-57 and 68-87 (culminating in a resolution in favour of the ECtHR adopted by a large majority of the senate (*Kamerstukken I* 2010/11, 32502, no. B)) and *Handelingen I* 2011/12, no. 22, item 3 (resulting in an almost unanimously adopted resolution, asking the Cabinet to keep on supporting the ECtHR and to abandon the issue of advocating a wider margin of appreciation for the states (*Kamerstukken I* 2011/12, 32735, no. C). A resolution was presented in the Lower House in which members of parliament pleaded for an obligation on the Court to leave a wider margin of appreciation to the states (*Kamerstukken II* 2010/11, 32500 VI, no. 29). Another resolution, adopted in the Senate, requested the Cabinet to respect the Court's autonomy and express its support for the ECHR system of protection (*Kamerstukken I* 2010/11, 32502, no. B), but it was rejected by the Lower House, albeit by a small majority (*Kamerstukken II* 2010/11, 32502, no. 11). A debate in the Lower House on the Cabinet position was held in Spring 2012, but was not completed; it was decided to continue the debate (*Kamerstukken II* 2011/12, 32317, no. 108), but since the fall of the Cabinet it has been put on hold and has not been resumed at the time of writing. On March 13, 2013, another plenary debate took place in the Lower House on the position and the work of the ECtHR; for more information on this, see text accompanying n. 98 *infra*.

[100] The Cabinet especially made some concessions during the debate in the Senate of February 2012; see *Handelingen I* 2011/12, no. 22, item 3. In May 2012 the Cabinet informed parliament about the results of negotiations in Brighton (Letter of the Minister for Security and Justice of 11 May 2012 to parliament, *Kamerstukken II* 2011/12, 30481, no. 9). There is no response to this by the Lower House, but the Senate is still monitoring developments, asking the Cabinet for more information about the decisions taken at the Brighton conference in June 2012 (*Kamerstukken I* 2011/12, 33000-V, no. AE); the information was provided in July 2012 (Letter of the Minister for Security and Justice to the Senate, *Kamerstukken II* 2011/12, 33000-V, no. AE).

urgency as a result. However, another debate on the position of the ECtHR took place in the Lower House in March 2013.[101] This debate was triggered by a judgment of the ECtHR on the TBS-system of July 2012. It appears from the debate that most political parties support the work of the ECtHR and embrace its judgments. The liberal party VVD was more critical, however, also of the role of national courts in applying the Convention. The PVV proposed a resolution (*motie*) to the government to resign from the European Convention of Human Rights, but the proposal was rejected by all other parties in the Lower House.[102] Evidently, thus, the political debate on the ECtHR work is still ongoing.

20.b. What kind of criticism is usually voiced (complaints about expansion of scope; quality of judgments; independence and impartiality of judges; disrespect for national sovereignty; insufficient knowledge of national law; etc)?

Both the political criticism and the criticism expressed in (scholarly) opinions concentrates on the intrusive character of the judgments of the ECtHR.[103] It is frequently stressed that the scope of the ECHR has been overly extended and that the ECtHR is deciding many cases that are not actually related to fundamental rights issues. In such cases, the critics state, the ECtHR is simply imposing its own view on national authorities, disrespecting national sovereignty and the democratic legitimacy of national legislation. Thus, the ECtHR is regarded as an anti-majoritarian body; as an outsider meddling with national policy choices with a disregard for national traditions and opinions. In particular, this sort of criticism is voiced in relation to the Court's activities in the field of social security law and immigration law.

20.c. If there is any criticism, is this a new development? When did the criticism first become apparent? Can you explain what gave rise to the criticism?

The Dutch criticism is very new. The Netherlands has always strongly supported the ECtHR and international human rights protection more generally. Indeed, the country was proud to host the event in 2010 at which the ECtHR received the Four Freedoms Award for its achievements in the field of human rights protection.[104] For most, the surge in criticism of the Court in 2010 therefore came as a surprise. As mentioned in the answer to question 20.a, the criticism really only surfaced in October 2010 with the critical newspaper opinion written by Thierry Baudet. It seems that there was fertile ground for debate, however, given the political atmosphere of the time. For example, a difficult issue came up in Autumn 2010 concerning the expulsion of a group of Iraqi asylum seekers. After the government had decided that the asylum seekers should be expelled, the Strasbourg court blocked the decision by granting interim measures. When it was informed of the active resolution to expel the asylum seekers, the Court sent a letter in which it prohibited the Minister from doing so for a period of three weeks.[105] It seems that this direct interference by the Court did not sit very well with the very strict migration policy favoured by the then sitting Cabinet (which was supported by the populist anti-migration party PVV).[106] Moreover, there was also political disagreement with the Court's

[101] Lower House debate March 13, 2013, via www.tweedekamer.nl.
[102] See report of the voting session of March 19, 2013, via www.tweedekamer.nl.
[103] See the various contributions mentioned in the footnotes accompanying the answer to question 20.a. For a brief summary in English of the debate, see J.H. Gerards and A.B. Terlouw, 'Solutions for the European Court of Human Rights: The *Amicus Curiae* project', in: T. Zwart, S. Flogaitis and J. Fraser, eds., *The European Court of Human Rights and its Discontents: Turning Criticism into Strength*, London, Edward Elgar UK 2013 (forthcoming). See also the various contributions to the debate in the Lower House of March 13, 2013.
[104] See www.fourfreedoms.nl.
[105] For an overview of the relevant documents, including the letter sent by the Court, see the letter from the State Secretary for Immigration and Asylum to the Lower House: *Kamerstukken II* 2010/11, 19637, no. 1368.
[106] Rather indirectly, this can be inferred from an emergency debate between the State Secretary for Immigration and Asylum and the Lower House; *Handelingen II* 2010/11, 18.

judgment on the issue of social security measures. While the government, the liberal party VVD in particular, intended to fight the economic crisis by cutting social security benefits, national courts held that some of these measures were not in conformity with the Court's case law on Article 1 of Protocol No. 1 to the Convention.[107] These national judicial decisions caused a great deal of disagreement, since some parliamentarians blamed the European Court of Human Rights for the judicial interference with national economic and social security policy.[108]

20.d. Does the criticism affect the status of the ECHR and the ECtHR's judgments/decisions in judicial decision making? If so, what concrete effects does this have (e.g. more frequent references to the margin of appreciation doctrine, more references to national constitutional law, restrictive interpretation of ECtHR judgments/decisions, disapplying the ECHR in favour of national (constitutional) law)?

Thus far, there does not seem to be any apparent or measurable impact of the criticism on judicial decision making. There are no references in case law to the criticism as such, nor are there any signs that the courts are less willing to review national decisions or legislative acts for conformity with the Convention. Although the Supreme Court recently handed down a judgment in which it deviated from an interpretation given by the ECtHR, there is no sign in the judgment itself that this has to do with criticism of the Court's position or work.

21. Are there any intentions at the political level to amend the constitution or legislation in order to change the courts' competences in relation to the interpretation and application of the ECHR?

On 6 September 2012 a private members bill to amend Articles 93 and 94 of the Constitution for the Kingdom of the Netherlands was submitted to the Lower House. This bill aims to reinforce the primacy of the legislature by stripping the courts of their power to disapply acts of parliament and the Constitution itself in the event of conflict with self-executing provisions of treaty law. In addition, the bill intends to empower the legislature to render a provision of treaty law, which would otherwise be self-executing, inapplicable by the courts.[109]

This bill should be understood against the background of the dynamic interpretation of the ECHR by the ECtHR and the willingness of the Dutch courts to apply the Convention as construed by the ECtHR, even if this implies that they have to thwart one or more provisions of an act of parliament which the Government and the majority in both houses of Parliament did not consider to be incompatible with the Convention. Some politicians are quite dissatisfied with this situation, obviously including the members of parliament who drafted the bill.[110] It seems very unlikely that the bill will be passed in two readings. The bill is rather a warning shot intended for the ECtHR and the Dutch courts than a serious attempt to strip the latter of their exclusive competence to determine whether a provision of treaty law is self-executing and thus may prevail over national law.

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[107] E.g. Rechtbank Den Haag 3 January 2012, *LJN* BU9921. See also Hof Den Haag 5 June 2012, *LJN* BW7457.

[108] MP Stef Blok (liberal party, VVD) in particular was highly critical; see, e.g., S. Blok, K. Dijkhoff and J. Taverne, 'Verdragen mogen niet langer rechtstreeks werken' [Treaties should no longer have direct effect], *NRC Handelsblad* 23 February 2012.

[109] *Kamerstukken II* 2011/12, 33 359 (R 1986), nos. 1-3. For a critical discussion of this bill and the accompanying Explanatory Memorandum see Joseph Fleuren and Joke de Wit, 'Het voorstel-Taverne. Schrapping van de rechterlijke bevoegdheid om wetten aan verdragen te toetsen' [The Taverne Bill to delete the judicial power to review acts of parliament for conflict with treaties], 87 *Nederlands Juristenblad* (2012), no. 40, pp. 2812-2818.

[110] *Kamerstukken II* 2011/12, 31 570, nos. 22 and 23.

PART 4 – Access to information and judgments

22. To what extent do national judges have access to and knowledge of the ECHR and the case law of the ECtHR?

22.a. Are judges trained to apply the ECHR, either in law schools or in professional training?

Both law schools and training courses for (future) judges pay comprehensive attention to the legal consequences of the ECHR and the case law of the ECtHR for the various branches of Dutch law. Generally, the study of ECtHR case law forms an integral part of the study of various fields of law (e.g. social security law, family law, administrative procedure, criminal law), both in law school and judicial training. Unfortunately, general doctrines underlying the ECHR and the case law of the ECtHR are no longer a compulsory subject for judges in training, although they form a standard part of the curriculum in all Dutch law schools. For experienced judges, dedicated ECHR courses are available (e.g. courses on recent ECHR developments in labour law or criminal law), but participation in these courses is voluntary.

22.b. How is information about the judgments/decisions of the ECtHR made available to the courts?

Digests of the most important judgments/decisions of the ECtHR are published in:

a) *European Human Rights Cases* – publishes all relevant ECtHR judgments and decisions with summaries in Dutch and (almost always) case notes in Dutch;
b) *Nederlands Juristenblad* (Netherlands Law Journal) – publishes Dutch summaries of a small selection of the most important judgments;
c) *Nederlandse Jurisprudentie* (Dutch Law Reports) (dedicated to criminal and civil law) – publishes a small selection of ECtHR judgments relevant to Dutch criminal and civil law, with summaries in Dutch and case notes;
d) *Administratiefrechtelijke Beslissingen* (Administrative Law Reports) – publishes a small selection of ECtHR judgments relevant to Dutch general administrative law, with summaries in Dutch and case notes;
e) *Nederlands Tijdschrift voor de Mensenrechten – NJCM-Bulletin* (Netherlands Journal for Human Rights) – records new developments in human rights law; small selection of important judgments of the ECtHR with extensive case notes;
f) Law Reports dedicated to specific branches of law, such as labor law, social security law, health law, immigration law, company law etc. – these law reports usually provide brief summaries of the most relevant judgments in the areas and (usually) case comments

The case law of the ECtHR also features prominently in the legal literature (textbooks, handbooks, monographs, commentaries on statutes, legal periodicals, etc.). Nowadays the ECHR and the case law of the ECtHR are considered an integral part of Dutch legal culture.

22.c. Are important judgments/decisions of the ECtHR available in the national language, e.g. because the government provides translations?

No, they are not. Most law journals and law reports publishing judgments of the ECtHR, however, publish Dutch-language summaries (usually prepared by scholars and experts in ECHR law).

22.d. Do you think there is an impact on the use of ECtHR judgments/decisions by national courts of the fact that they are usually only available in English and French?

Judges and their staff are used to reading the judgments/decisions of the ECtHR in English and they are generally able to understand them. It appears to be more difficult for judgments that are only available in French, since many judges and staff do not read French sufficiently well to understand the finer nuances of these judgments. Indeed, many judges (as well as legal practitioners) admit they would not really be able to understand such judgments and they seldom make the effort of trying to read the entire judgment. However, they are usually aided by the practice of providing Dutch-language summaries, case notes and case comments, which helps them understand the gist of the judgment. Important judgments are thereby generally sufficiently well-known and understood.

23. Are national judgments/decisions in which the ECHR plays a role available electronically? Are they translated into English?

All judgments of the highest courts (Supreme Court, Administrative Jurisdiction Division of the Council of State, Central Appeals Tribunal, Trade and Industrial Appeals Tribunal) are published electronically at www.rechtspraak.nl, except for rulings dismissing an action as manifestly unfounded or inadmissible, or with a standard formula. Judgments of the Administrative Jurisdiction Division of the Council of State are also made available at www.raadvanstate.nl since 1 April 2002. In addition, many lower court rulings in cases in which the ECHR has been successfully invoked are electronically published at www.rechtspraak.nl (operational since 1999). The same applies to rulings in which a Convention-based claim or defence has been rejected. However, there is a selection system, with the result that not all judgments are published electronically; in particular, judgments are not published if the judgment only contains standard reasoning (*standaardmotivering*).

Every judgment that is published at www.rechtspraak.nl is provided with a National Case Law Identifier (*Landelijk Jurisprudentie Nummer: LJN*). Judgments published before 1999 might also have been given a National Case Law Identifier, so that their sources can be traced via www.rechtspraak.nl. In the near future National Case Law Identifiers will be replaced by or integrated with European Case Law Identifiers.

Dutch courts do not provide translations of their judgments in English.[111] Digests in English of important Dutch court judgments involving questions of public international law, including on the ECHR, are published by the T.M.C. Asser Institute (The Hague) in *Netherlands Yearbook of International Law*. After some years the digests are also published in a database named 'Netherlands Judicial Decisions involving Questions of Public International Law', which is freely accessible via the website of the T.M.C. Asser Institute (www.asser.nl).

English translations of a number of Dutch court rulings in which references to the ECHR are made have been made available electronically via *Oxford Reports on International Law in Domestic Courts*.

[111] However, there may be very rare exceptions, such as HR 8 July 2008, *LJN* BC7418 (English translation: *LJN* BG1476).

PART 5 – Concluding questions

24. To what extent do you think there is a connection between, on the one hand, the main features and characteristics of your constitutional system and the status of international law in the national legal system and, on the other hand, the impact of the ECHR and the judgments of the ECtHR on national case law?

In the Netherlands, the important role and the enormous impact of the ECHR on case law (as well as on legislation and policy making) is at least partly due to the prohibition of constitutional review, the lack of substantive constitutional standards for judicial review, the short catalogue of fundamental rights and the priority of all self-executing provisions of international law. Combined with the ready availability of concrete, practical standards developed by the European Court of Human Rights, these factors have resulted in the ECHR becoming almost a substitute bill of rights.[112] It is applied in the same way as the constitution is applied in other states, while the Constitution itself does not have a great role to play. This is sometimes criticised, either because the the Strasbourg court is considered to have had too great an impact,[113] or because it is held that more attention should be paid to national constitutional values and constitutional traditions[114]. Thus far, however, few endeavours have been made to make the kind of amendments to the Constitution that would be needed to give it a stronger position.[115] In particular, as long as constitutional review is prohibited and the constitutional fundamental rights provisions are not redesigned and augmented to make them more suitable for judicial review, there is little chance that national courts will start to refer to the Constitution rather than the Convention.

25. How does the application of the ECHR in the case law of the states relate to the role of national fundamental rights (e.g. constitutional rights)?

It is clear from the answers to the preceding questions that the ECHR and the standards developed by the ECtHR dominate Dutch case law in fundamental rights matters. Dutch constitutional provisions are hardly ever applied, although there are some rare exceptions, usually concerning typically Dutch characteristics, such as the freedom of education (on which the Dutch constitution contains a very special provision with long historical origins) or the prohibition of prior restrictions of the freedom of expression (where the Dutch constitution clearly provides more protection than the ECHR).[116] In all other cases, however, the ECHR provides the main source of fundamental rights (although references are sometimes supplemented by references to international human rights treaties, especially if they offer more concrete protection, and increasingly by references to the EU Charter of Fundamental Rights). As set out in relation to questions 14-16, the Dutch courts thereby diligently follow the Court's interpretations and make them their own, even if they sometimes translate the Court's standards into notions, concepts and criteria that are more easily applied in the Dutch context.

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[112] For this analysis, see also Claes & Gerards, *supra* n. 32.
[113] See the criticism discussed in relation to the questions of Part 3.
[114] See in particular the report by the Government Commission on Reform of the Constitution, The Hague, November 2010, *Kamerstukken II* 2010/11, 31570, no. 17, addendum.
[115] Some proposals have been made, in particular by the Government Commission on Reform of the Constitution (see previous footnote), but there is no intention to follow up on these – see the Cabinet views on the report of 24 October 2011, *Kamerstukken II* 2010/11, 31570, no. 20. Furthermore, although a bill introducing the possibility of constitutional review has been adopted in a first reading, it is still pending; see most recently *Kamerstukken II* 2011/12, 32334, no. 6.
[116] See further, with examples, Claes and Gerards, *supra* n. 32, and, for an analysis of the fundamental rights case law and advisory opinions of the Council of State, J.H. Gerards, W.J.M. Voermans and others, *Juridische betekenis en reikwijdte van het begrip "rechtsstaat" in de legisprudentie & jurisprudentie van de Raad van State* [Legal meaning and scope of the notion of 'Rechtsstaat' in the legisprudence and case law of the Council of State] (The Hague, Council of State 2011).

26. To what extent do you think that debates on the role of the ECtHR and its judgments have an impact on national case law?

Thus far, the impact on national case law is slight – although judges show they are aware of the criticism (when asked), their judgments do not disclose any changes as a result.

27. Do you think there is any relation between the debate on the ECHR and the national constitutional system for implementing international law and if so, to what extent?

In the Netherlands there is, at least to a certain extent, a connection between the debate on the evolving interpretation of the ECHR by the ECtHR on one hand, and the constitutional system on the other. Because the courts are prohibited from reviewing acts of parliament for conflict with the Constitution for the Kingdom of the Netherlands, the Charter for the Kingdom of the Netherlands and general principles of (customary) law, they have to take recourse to the ECHR (or other human rights treaties) in the event that an application of an act of parliament would infringe fundamental rights or fundamental principles of law. Consequently, the evolving interpretation of the Convention by the ECtHR is readily blamed for interfering with the primacy of the national legislature. The case law on Article 1 of Protocol No. 1 to the Convention may serve as an example. Some critics have pointed out that a provision protecting property rights has been turned by the ECtHR into a shield against abrupt changes in the law which would diminish or even bring an end to benefit entitlements, whereupon it is used by Dutch courts to examine the lawfulness of measures to restructure social security legislation which have been adopted by Parliament (see question 20c). Whatever one's assessment of this development in the case law of the ECtHR,[117] this criticism obscures the fact that the primary legislature (*wetgever in formele zin*) is also according to Dutch (constitutional) law obliged to respect fundamental principles of law, including the principle of legal certainty.[118] Because of the ban on reviewing the constitutionality of acts of parliament, the ECtHR is exposed to the criticism that it is imposing its own values on Dutch law. A substantive debate on the question of the extent to which this is actually the case is rarely heard.

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[117] For a critical analysis of the mechanisms underlying such developments in the case law of the ECtHR see J.H. Gerards, *Het prisma van de grondrechten* (inaugural address), Nijmegen: Radboud Universiteit Nijmegen 2011, also available in English: 'The prism of fundamental rights', 8 *European Constitutional Law Review* (2012), no. 2, pp. 173-202.

[118] *Aanwijzingen voor de regelgeving* (Legislative Drafting instructions), *aanwijzing* (instruction) no. 18. Cf. HR 14 April 1989, *NJ* 1989, no. 469 (*Harmonisatiewet*).

SWEDEN

Iain Cameron & Thomas Bull

PART 1 – The status of international law in the national constitutional system

1. Can you briefly characterise your national Constitutional system? Please pay attention to matters such as:

- **Character of the state (monarchy, republic…)**
- **System of government (parliamentary, presidential…)**
- **Character of the Constitution (written, unwritten)**
- **System for and extent of separation of powers (both horizontal (*trias politica*), and vertical (federation vs. unitary state, decentralisation or devolution))**
- **Main sources of fundamental rights**

Sweden is a unitary state with a constitutional monarchy. The monarch is head of state but has only symbolic powers. It has a unicameral legislature, the *Riksdag*, and the system of government is parliamentary with 349 MPs elected proportionally from party lists for four-year terms. Coalition governments are common. The head of the government is the Prime Minister who appoints the cabinet. Sweden does not have ministerial government. Instead, all government decisions (with a few exceptions) are cabinet decisions, even if they are prepared within specific ministries. The bulk of administration in Sweden is performed by the 290 local authorities, and, in the areas of transport and health care, by the 21 provincial authorities. There are also a large number of national administrative agencies which operate in relative independence from the government, but which are accountable to it. These are steered in a number of ways by government instructions and ordinances, the power of appointment of the director of the agency, budgetary means and informal advice. However, under the constitution, the government is specifically prohibited from deciding individual cases before administrative authorities, except in the – relatively – rare cases where a law specifies that the government itself is the final administrative decision-making body.[1] Except where administrative authorities are specifically given oversight or appeal functions, they are not in any hierarchical position vis-à-vis one another.

There are parallel systems of ordinary and administrative courts. Administrative decisions can generally speaking be challenged before the administrative courts. The ordinary courts have exclusive jurisdiction over private law and criminal law matters.[2] There are specialist courts in a number of areas, e.g. labour law, migration law, environmental law. There are 48 district courts (*tingsrätter*). There are six appeal courts (*hovrätter*), which are situated in different parts of the country. There are categories of cases, including trivial cases, where an appeal against a judgment in the district court to the Court of Appeal requires permission to appeal. A trial in the Court of Appeal is a full retrial, of issues of fact and law. A case may only be heard by the Supreme Court (*Högsta Domstolen*) if this court gives permission for this review. The Supreme Court, in principle only rules on points of law,

[1] IG SFS 1974:152, Chapter 12, section 2 (hereafter we will use the form 12:2).

[2] The autonomous concept of a "criminal charge" under Article 6 of the ECHR has caused problems in relation to Swedish public law sanctions (tax penalties, environmental penalties etc.). Appeals against such penalties are brought before the administrative courts. However, the *ne bis in idem* rule in Article 4, Protocol 7 has meant that both the ordinary and administrative courts have considered the issue of whether the imposition of such a public law sanction – where it is regarded as a criminal charge – rules out subsequent prosecution for an offence concerning the "same activity".

not questions of fact. There are 12 district administrative courts and four administrative courts of appeal.

As with the Supreme Court, for most cases to be heard by the Supreme Administrative Court (*Högsta förvaltningsrätten*), this court must give permission for review. There is no formal system of precedent (*stare decisis*) in the Swedish judicial system. However, in practice the Supreme Administrative Court and the Supreme Court's decisions command high authority. Only selected decisions of the Courts of Appeal or Court of Administrative Appeal are published and unpublished cases have only a limited precedent value. A district court or a district administrative court judgment has little or no precedent value, and is rarely quoted as an authority in legal textbooks.

The judiciary in Sweden is a career judiciary. To become a judge one must have a law degree (which is four and a half years full-time study) followed by three years clerking at the courts. There are around 1000 judges, of which some 600 positions have "strong" tenure. A tenured judge can only be removed from office if s/he has been convicted of a crime or if through "gross or repeated neglect of his official duties s/he has shown himself or herself to be manifestly unfit to hold the office" (RF 11:5).[3] Discharge of judges on these grounds – which hardly ever occurs – are issues of labour law, with the final decision lying with the Labour Court. The relatively large number – 400 – of other judges are mainly junior judges at the beginning of their careers. They are only covered only by the ordinary labour law protections against dismissal, although having said that, these protections are relatively strong. There is no prohibition on judges being politically active, even if this is relatively rare. Many of the more senior judges are appointed after they have served a considerable amount of their time as civil servants in government departments, usually investigating the need for law reform or drafting legislation. While this provides them with valuable insights into the legislative process, it is open to the criticism that it gives them a one-sided, and restricted, view of the judicial function. At present, all the more important judicial appointments are made by the government, although it follows the recommendations of an independent commission on judicial appointments.[4] Although on paper, the protection of judicial independence for the large category of not-yet tenured judges in Sweden is weaker than in many other countries, judicial appointments are not politically motivated and even judges without strong tenure behave with full independence from the executive. Having said this, their lack of tenure may serve to make them more cautious (and so less inclined to creative solutions to ECHR and constitutional problems, see further below).

There are four documents in Sweden which have constitutional status: the Instrument of Government (IG – *Regeringsformen*), the Freedom of the Press Act (TF – *Tryckfrihetsförordningen*), the Freedom of Expression Act (YGL – *Yttrandefrihetsgrundlag*), and the Succession Act (SO – *Successionsförordningen*), governing the succession of the head of state (the monarch). The Instrument of Government (hereinafter, IG) corresponds to what most countries would regard as the constitution. It was adopted in 1974, totally replacing the earlier version from 1809. It sets out, in 13 chapters, basic rules governing parliament and government, their composition, relationship inter se, law-making, budgetary and treaty-making powers, the functions and competence of the courts and the administrative agencies, constitutional control mechanisms and emergency powers.

The Freedom of the Press Act, the original version of which dates back to 1734, governs the printed media and the Freedom of Expression Act governs the electronic media. While many states provide for constitutional protection of freedom of expression, Sweden is unusual both in the signifi-

[3] A decision to prosecute a judge of the Supreme Court and Supreme Administrative Court for an offence committed in the course of his/her duties is made by the senior government legal officer, the Chancellor of Justice, and tried by Supreme Court. The Supreme Court also determines whether such a judge is for any other reason incapable of performing his/her duties (RF 12:8).

[4] This category includes all Supreme Court and Supreme Administrative Court judges, as well as the presidents and chamber presidents of the courts of appeal.

cance it gives to this right over other rights and to the level of detail in the constitutional system of regulation. Both acts provide for exhaustive lists of criminal offences which can be committed by means of the printed, respectively electronic media.

In addition to the rights set out in the Freedom of the Press and Freedom of Expression Acts, IG Chapter 2 sets out a catalogue of civil and political rights. These rights are split into two categories: rights the limitation of which requires constitutional amendment and "relative" rights. The category of relative rights can be restricted by an ordinary statute, passed by simple majority in the parliament. For most relative rights (as well as for those rights which require constitutional amendment), the statute must satisfy a proportionality test.[5] The category of relative rights includes the freedoms from arbitrary arrest and detention, from search, seizure, telecommunications and mail interception (section 6), from deprivation of liberty (section 8) and the right of access to court to challenge detention (section 9) fair trial (section 11).[6] The rights set out in the Freedom of the Press and Freedom of Expression Acts can only be altered by constitutional amendment. Three other such rights relevant included in IG Chapter 2 are the prohibitions of the death penalty (section 4), inhuman or degrading punishment (section 5) and retroactive criminal law (section 10). The process of constitutional amendment is relatively easy in Sweden, requiring only two votes by a simple majority in parliament, with an intervening general election. Bills involving limitations in constitutional rights, or otherwise raising issues under the Constitution, are sent to the parliamentary Committee on the Constitution, which makes a report on the issue.

The final elements of rights protection are the European Convention on Human Rights (ECHR) and, since the Lisbon treaty entered into force, the EU Charter of Fundamental Rights and Freedoms (which applies when Swedish institutions act within the framework of EU law). Sweden has ratified a large number of regional and universal human rights treaties. However, the ECHR has a special legal status. It was incorporated by means of an ordinary statute, in 1995[7] but a special provision, now Ch. 2 section 19, was added to the IG which provides that "a law or other regulation may not be issued in conflict with [the Convention]". This provision means that if a norm violates the ECHR (as interpreted by the ECtHR), it also violates the Constitution and so, in accordance with IG 11:14 (see below, answer to question 2) should not be applied. The provision is primarily directed to the legislator. Pre-legislative scrutiny of statutes is the primary mechanism for avoiding conflicts with either the Constitution or the ECHR. However, if for some reason this scrutiny has failed to detect a conflict, or a conflict has later arisen as a result of later case law (see below, answer to questions 16 and 17), IG 2:19, together with IG 11:14 gives the Swedish courts the power, and the duty, to refuse to apply the offending norm. Thus, in practice, the ECHR has "quasi-constitutional" status in Sweden.

2. a. To what extent are the national courts (and/or non-judicial bodies, such as Councils of State) empowered to review the compatibility of acts of parliament and other legislation with the Constitution?

2. b. If they are competent to do so, what system of Constitutional review is used, i.e.:

- **A system of concentrated review (with a Constitutional Court having the final say on the interpretation of the Constitution)**
- **A decentralised system (where all courts have the power to decide on the constitutionality of acts of Parliament)**
- **Anything in between?**

[5] There are also procedural safeguards for rights-limiting legislation. Such a statute can be blocked for a period of a year by a minority of MPs, a mechanism designed to allow the mobilisation of public opinion. The legislative process, and the political consensus which lies behind much Swedish legislation, means that this mechanism is used only rarely.

[6] In 2011, fair trial within a reasonable time and a general protection of personal integrity were added.

[7] SFS 1994:1219. Sweden is bound by additional Protocols 1, 4, 6, 7 and 13, but not Protocol 12.

2.c. If they are competent to do so, is there:

- **A system of *a priori* review, i.e. review of compatibility before an act is adopted by Parliament (e.g. advice by the Council of State)**
- **A system of *ex post* review**

If so, what kinds of procedures are in place?

- **Abstract and/or concrete control of norms by direct appeal?**
- **Abstract or concrete control of norms by means of preliminary questions?**
- **A combination of *a priori* and *ex post* review?**

There is no specialised constitutional court in Sweden. All the courts in Sweden have a power of constitutional review (IG 11:14). The effect of this is only *in casu* – the offending provision is not applied in the concrete case. Unusually, in international comparison, even administrative authorities have this power as well (IG 12:7). Until 2011, the power of constitutional review has been circumscribed. The courts had to disregard only a *statute or government ordinance* which was "manifestly" in breach of the constitution. For administrative regulations issued by administrative agencies or local authorities there was no such limit. Quantitatively speaking, there are many more administrative regulations than ordinances, and many more ordinances than statutes. This limit to judicial review of statutes and ordinances has been abolished from 1st January 2011. It was the Social Democratic Party (SDP) which, traditionally, was reluctant to remove this limit. In the last two elections, this party has not been voted into office by the electorate. It thus has come to the realization that it is no longer "guaranteed" political power. Moreover, the SDP appears to have increasingly accepted that the Swedish judiciary act and will continue to act with self-restraint as regards constitutional review. Thus, it abandoned its opposition to removing this limit. The power of constitutional review has in the past been used only rarely. As mentioned, the main mechanism for avoiding the legislative clashes with constitutional rights, and for ensuring that legislation is well-thought out, coherent, and (hopefully) effective is the legislative process itself. Having said this, there is a trend during the 2000s for the Swedish courts to refer more frequently to the IG and the ECHR than before.[8]

Part of the process of pre-legislative scrutiny is referral to the Law Council. This body normally consists of six people, of whom four should be acting judges of the Supreme Courts.[9] The remaining two can be retired judges from the same courts. The courts choose who to send to the Law Council, not the Government, and this is usually done so that each judge will take his or her "turn" of serving two years on the Council. The Law Council normally works in two sections with three members in each. The Government is never bound by the opinion of the Law Council. Moreover, although the Law Council should be heard, if for some reason it has not, [10] then this in itself is no reason for not enacting the law. The Law Council is thus only an advisory body, and its opinions have no formal legal effect.

In accordance with IG 8:19, the Law Council's scrutiny of draft bills is focused on five specific issues: the effect on the Constitution, the coherence of the proposal with the existing system of legal regulation, the likely impact on the principle of legal certainty, if the law is constructed in a way that will make it possible to achieve its underlying objectives and, finally, to detect issues that may become problematic in practice.

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[8] See, e.g. NJA 2007 s. 1037 (agents provocateurs) and NJA 2005 s. 805 (incitement to hatred). Cases from the Supreme Court are cited from the semi-official series, *Nytt Juridisk arkiv* (NJA).

[9] It can mentioned that the supreme courts of course do not let members that have commented upon draft legislation as members of the Law Council later on take part in a judgment on the constitutionality of that same law.

[10] IG 8:19 provides that there is no need to send a draft bill to the Law Council if the change in the law in question is of minor importance (i.e. it is a minor technical issue) or if submitting the draft bill would delay the legislation such that major negative consequences would follow. The latter exception is occasionally invoked regarding taxation legislation.

The Law Council can thus be said to fulfil two different tasks: The first is quite technical, concerning the logic of law and its effects; ensuring that terms and concepts are consistent with existing law, proposing new wording of individual provisions if they are imprecise or unintelligible, etc. The second task is quite different; the Law Council should check any upcoming legislation against constitutional law and the principle of legal certainty. This involves the constitutional rules on the delegation of legislative powers to the Government and local authorities, the protection of constitutional rights and the general principle that legislation should be introduced in a foreseeable way. This kind of scrutiny – especially when the principle of proportionality is taken into account - comes much closer to the sensitive boundary between of law and politics. Here we can talk about the Law Council as a form of judicial preview. [11]

Assuming the relatively high quality of pre-legislative scrutiny continues to apply, it is unlikely that the mere removal of the limit in IG 11:14 will in itself lead to more constitutional review. The removal of this limit in theory also makes it easier for the courts to engage in review of statutes and ordinances on the basis of the ECHR. But for the same reasons, this is also unlikely to increase and, as explained in the answers to questions 16 and 17, the courts have adopted another mechanism for self-restraint as regards review based on the ECHR.

3.a. Can you briefly characterise the status of international law (treaties, decisions/resolutions by international organizations, customary international law) in the Constitutional order? Do treaties, decisions/resolutions by international organisations and/or customary law form part of the law of the land?

Sweden is a dualist state, meaning that, even if ratification of a treaty has been approved by the parliament, it still has to be incorporated in some way into the Swedish law (usually by statute) before it can create rights (and, obviously, duties) for individuals. While it is still open to the courts to take account of *non*-incorporated treaties by means of the principle of treaty conform construction,[12] such treaties have little significance in practice in legal argumentation before the courts.

Decisions/resolutions by international organisations (other than the EU) are, in themselves, not the "law of the land". The situation regarding customary international law is disputed. There are a few cases where the Swedish courts take account of developments in customary international law, indicating that custom *may* form part of the law of the land. But even if this is the case, custom would not be applied if it was in conflict with the provisions of a statute.

A slightly more detailed explanation for the dualist nature of the system is as follows. There are a few areas of "sector monism" where a statutory provision explicitly provides the courts with a "channel" for incorporation of customary international law or treaties. Otherwise, treaties are published in the series Sweden's international agreements (*Sveriges överenskommelser*, SÖ). Originally, all treaties were published in the official legislative gazette (*svensk författningsamling*), specifically in order to ensure that all organs of the state complied with these. However, a new gazette was started in 1912 only for treaties, *Sveriges överenskommelser med främmande makter* (now *Sveriges internationella överenskommelser*, SÖ) and so treaties increasingly only came to the attention of specialized groups. With the rise of parliamentarism, it was no longer acceptable that treaties concerning issues of importance were not subject to parliamentary approval. Nonetheless, the issue of whether treaties could be self-executing did not arise squarely before the courts, and thus was unresolved. It was only resolved in the early 1970's, just before the adoption of the new IG, when the Swedish courts ruled

[11] See T. Bull, 'Judges without a court: judicial preview in Sweden', in: Campbell, Ewing & Tomkins, eds., *The legal protection of human rights. Sceptical essays* (Oxford, OUP 2011).

[12] This applies generally, to all treaties, not simply human rights treaties. See, e.g. Bill 1999/2000:61 p. 71-73, NJA 1988 s. 572, NJA 1991 s. 188, NJA 1992 s. 532 and NJA 2005, s. 805.

that, in the absence of legislation converting it to Swedish law, the European Convention on Human Rights (ECHR) did not create direct rights capable of being invoked before national courts.[13]

Thus, the dualism of the Swedish legal order is a creation of case law. Nonetheless, dualism is implicit in the structure of RF, particularly the provisions dealing with transfer of legislative power, which are based on a conceptual distinction between the realms of international law and domestic law – a distinction which all international lawyers know is increasingly difficult to sustain.

It should be stressed that, in Sweden, the first argument against letting a ratified but unincorporated treaty create rights for individuals is not so much democracy in the sense of parliamentary control over the government, but constitutional notions of the domestic division of powers between parliament and government on the one hand and the courts on the other. The second argument relates to legal certainty (*rättssäkerhet*), an important concept in Swedish legal thinking. This involves not simply the foreseeability of particular norms but also, for want of a better term, "system coherence". This requirement of coherence is something which is particularly important in codified legal orders. It can, of course, be argued that legal certainty is not a good reason for denying a right to an individual exercisable vis-à-vis the state, as opposed to another individual. On the other hand, allowing unincorporated/untransformed treaties to create rights would still mean that the Swedish courts would have to decide which rights in a treaty were sufficiently clear, complete etc. to be self-executing. This would, in the Swedish legal tradition, be regarded as a usurpation of the role of parliament.

Even if arguments could be found that the Swedish courts should take such a power, it is clear that this would lead to costs to society in the form of litigation, ineffective use of scarce judicial resources, and risks of conflicting findings in the administrative and ordinary courts.

The practice which has developed requiring conversion to national law is somewhat wider than simply treaties creating rights or, naturally, duties for individuals. Treaties which require the enactment of rules governing the activity of government departments, administrative agencies, or local authorities, especially if this activity concerns individuals, should also be converted, if the rules in question have no existing national equivalent, or conflict with existing national rules.

Nowadays, the coherence of the Swedish dualist position is undermined a little by the whole scale incorporation of EU law, and the incorporation rather than transformation of the ECHR. Swedish judges are now more familiar with using "foreign" texts and "foreign" case law (see further the answer to question 10 below).

3.b. If so, what rank do treaties, decisions/resolutions adopted by international organisations and/or customary international law have in the national hierarchy of norms? Is there some kind of hierarchy?

As Sweden is dualist, they have only the rank that the instrument of incorporation gives them.

3.c. If international law is not part of the law of the land, what guarantees are there that the state will comply with its international obligations under treaties, decisions/resolutions by international organisations, or customary international law?

Claims that the Swedish government, the administration or parliament is not complying with an international obligation, assuming that the person bringing the claim can show some sort of personal interest in the matter (a cause of action) within the meaning of the Code of Judicial Procedure 13:2, can be brought before the courts. However, there is an obstacle to claiming damages on the basis that

[13] RÅ 1974 ref. 61.

a ratified, but unincorporated, treaty has not been properly implemented in Sweden (Tort Liability Act 1972:207, 3:7).[14] Even if such an obstacle does not apply the courts are – with the exception of cases concerning the ECHR – invariably very sceptical to such a claim.

There are a few examples of ”sector monism” in Sweden, e.g. the statute implementing the Vienna Convention on Diplomatic Relations and other treaties providing for immunities.[15] This statute also includes a "priority" clause, providing that the law applies over possibly contrary provisions in other statutes. Another example of sector monism is Chapter 22, section 6 of the Criminal Code, which provides that it is a criminal offence to violate the Geneva Conventions or general principles of international humanitarian law – in other words, the content of the offence in both cases is defined by international law. This provision has been criticized as being contrary to the principle of legal security. It has been recently proposed that this latter provision be replaced with a new law, specifying in detail what these offences are.[16]

3.d. Do the competent courts apply treaties, decisions/resolutions adopted by international organisations and/or customary international law as such (i.e. as sources of international law) or are they transformed into sources of national law in the process of incorporation? Are there any differences in practical consequences between the different approaches? Or is this a mere academic question without practical consequences?

See the answer to question 3.a. above.

3.e. Would you characterize your Constitutional system as monist, dualist or a hybrid system?

See the answer to question 3.a. above.

4. To what extent and how are the national courts empowered to review the compatibility of the Constitution, acts of Parliament, lower legislation, and other decisions taken by public authorities with treaties, decisions/resolutions adopted by international organisations and/or customary international law?

They are not, with the exception, of course, of EU law and thus, of resolutions/decisions of e.g. the Security Council which are first incorporated into EU law. Here a specific constitutional provision provides support for a review of constitutional conformity between EU-law and fundamental aspects of Swedish constitutional law (10:6 IG).

5. Can parliament and/or the government play a role in determining whether an act of parliament which has been already been enacted and entered into force is compatible with the constitution and/or international law?

The parliamentary Committee on the Constitution determines before the bill is adopted whether it is compatible with the constitution. The parliament can in many cases authorize the government to

[14] This provides that a damages claim may not be brought against the parliament or the government for a decision taken by them (including the adoption of a norm) unless the decision in question has been annulled or changed (either voluntarily or after a successful legal challenge on other grounds). Attempts to claim damages on the basis that the government or the parliament has failed to implement a treaty provision have failed (see e.g. NJA 1978 s 125).
[15] SFS 1976:661.
[16] Lagrådsremiss March 2013.

suspend the operation of a statute (IG 8:4). This could be used inter alia where the application of the statute risked violating Sweden's obligations under international law.

PART 2 – Competences and techniques of national courts to apply the ECHR

6.a. Do all the substantive provisions of the ECHR (including the various substantive protocols) have direct effect, i.e. are they self-executing/directly applicable?

In Sweden, the method of incorporation of the ECHR has been to incorporate the entire text of the convention and its protocols in a law. All the substantive rights in the convention thus have the force of law. The issue of the content of these rights, e.g. what does the requirement of an effective remedy mean in practice, has been left to legislature, in the first place, backed up by court scrutiny in concrete cases. The higher courts have awarded damages for decisions of administrative authorities, lower courts, and local authorities which have been found to breach a Convention right.

6.b. To the extent that the substantive provisions of the ECHR and its Protocols are considered to be self-executing / directly applicable / have direct effect, does this ipso facto mean that these provisions result in subjective rights enforceable before the national courts? Or are there any substantive provisions that are considered to be self-executing, but may not result in subjective rights? If so, please give examples.

See the answer to question 6.a. above.

6.c. If some of the substantive provisions of the ECHR and its Protocols are considered to be of such a nature that they can only be implemented by means of legislative measures, are the national courts nevertheless competent to apply those provisions to establish state responsibility in cases where those provisions have been violated?
If so, which remedies are possible? E.g.:

3. **Are the national courts competent to order the state or its bodies to compensate for the damage caused by violations of non-self-executing provisions of the ECHR and its Protocols?**
4. **Are the national courts competent to order the State to adopt (legislative) measures which are necessary to implement non-self-executing provisions of the ECHR and its protocols?**

See the answer to question 6.a. above.

7. The case law of the ECtHR includes (positive) obligations on national courts to apply the Convention in relations between private parties (i.e. in horizontal relationships). Courts must refrain from interpreting contractual obligations in violation of the ECHR (*Khurshid Mustafa & Tarzibachi*, *Pla & Puncernau*). When deciding on horizontal conflicts between rights (e.g. the right to freedom of expression and the right to respect for one's reputation) they have to take account of the ECHR, and sometimes they are required to interpret national law in a specific manner (e.g. family law cases should always be decided in concreto, taking the best interests of the child into account). Do the national courts indeed apply the relevant ECHR provisions (or the corresponding provisions of the incorporating act) to cases between private parties, in compliance with the case law of the ECtHR?

The Supreme Court has found that the ECHR cannot be given direct horizontal effect.[17] The fact that a violation was found in *Khurshid Mustafa & Tarzibachi* also shows the resistance the courts have to taking the ECHR into account in private relationships. At least in contract law, there is a "general clause" allowing contracts to be (re-)interpreted when this is equitable, so the resistance the courts are showing is due to their unfamiliarity with this way of reasoning, and the – extreme - caution usually shown by the lower courts in developing the law. The courts are uncertain as to the extent to which they must/should take the ECHR into account, i.e. what does the ECHR mean in an individual case? The strengthening of the right of personal integrity (IG 2:6) from 2011 does not change this, as the right is exercisable only vis-à-vis the state. There are protections available both under private law and criminal law (defamation etc) which will cover most situations in which the ECHR could be said to impose positive obligations to protect individuals from other individuals. The question is what the courts can or should do in the exceptional situation where no such specific protection is available.[18]

However, in specific areas of law, the ECHR have had a more profound effect on legal relationship between private parties. Particularly the Labour Court (*Arbetsdomstolen*) should be mentioned, as it has recognized a horizontal effect of the Convention for some time.[19] It should be noted that the Labour Court's willingness to apply the ECHR between private parties has been based on the fact the Convention is law in Sweden, so it is not an instance of "direct" application of the treaty itself.

8.a. Are there examples of cases in which national legislation or national decisions have been set aside / declared null and void / disapplied because of a conflict with the ECHR? If so, can you estimate if this occurs frequently / sometimes / rarely?

There are only very few cases where national legislation has not been applied because it has been found to be in conflict with the convention. There are a relatively large number of cases where the higher courts have set aside decisions of lower courts, administrative authorities and local authorities. The effect of this is *in casu*. However, it will have a "knock-on" effect on similar administrative decisions (see the answer to question 14). Many of these cases have concerned Article 6 issues (fair trial, fair hearing in administrative cases etc.). Thus, where it is rare for national courts to disapply legislation, this frequently occurs for administrative decisions.

8.b. If constitutional review is possible: can you estimate if the constitution is used more often / just as often / less often than the ECHR as a basis for holding that legislation or decisions do not comply with fundamental rights norms?

The main right the Swedish courts have used is Article 6 ECHR, to correct deficient court proceedings. There was, until 2011, no equivalent to Article 6 in the Constitution, and Constitutional rights (while important in the legislative process) have been invoked in the courts relatively rarely. Part of the idea behind the recent change in the constitution has been to "activate" IG chapter 2 and encourage the courts to use it more often.

[17] NJA 2008 s 946.

[18] See RÅ 2008 ref 87 and the Swedish case currently on appeal before the Grand Chamber, E.S. v. Sweden (where the chamber, by 4 votes to 3, found no violation of the ECHR).

[19] AD (Arbetsdomstolen,Yearbook of the Labour Court,) 17/1998, AD 83/2002 and AD 74/2012.

8.c. Are there any examples where the court has declined to use its competence to set aside national legislation / decisions in order to respect separation of powers (between the courts and the legislature or between courts and administrative bodies) or the sovereignty of parliament?

Yes: see the answers to questions 15 and 16 below.

9. Are the national courts competent to order the national legislature to bring national law into conformity with the ECHR by means of amending or introducing legislation?

No.

10. Do national courts strive to interpret national law (including the national constitution) in harmony with the ECHR?

Yes. This has been the practice of the Supreme Court, followed, after hesitation for a number of years, by the Supreme Administrative Court.[20] However, if the Constitution requires another result than that arguably required by the ECHR, the constitution is to be preferred.[21] So far, there has been only one case where this issue arose squarely. It concerned a clash between two rights: the Convention right to personal integrity and the constitutional right of freedom of information (the exhaustive listing of grounds in the Freedom of the Press Act for keeping personal data confidential). The Supreme Administrative Court found it impossible to reconcile these two rights, and so preferred the latter. This is not to say that the ECtHR would come to a different conclusion: it may weigh the competing rights in the same way.

Constitutionally speaking, giving primacy to the constitution is correct and in line with the idea that it is the legislature which is mainly responsible for ensuring that Sweden complies with the ECHR. If the above case had gone further to the ECtHR, and it had found that the application of the constitutional provision violated the ECHR, the Swedish parliament would either amend the constitution (if the conflict was unavoidable, as the Supreme Administrative Court found in the case) or, providing some sort of balancing test to avoid future conflicts in similar cases. Constitutional amendment was initially proposed following the Holm case, when the composition of the jury (jury trial only applying to freedom of the press cases in Sweden) was found to violate the fair trial requirement of Article 6. However, on later analysis, the conflict could be resolved by bringing the ECtHR judgment to the courts attention, and encouraging the courts to apply the rules on excluding jurors for lack of independence.

There are a small number of cases where the Swedish courts can either be seen to have followed a "reductionist" interpretation of a statute on the basis that this was required by the ECtHR case law, or can even be seen to have refused to apply the statute in question. The dividing line between the two is very thin. One case concerned a person who objected to paying the obligatory church tax. The circumstances were almost identical to the *Darby* case, where the ECtHR had recently ruled that there was a violation of Article 9. The Supreme Administrative Court applied the *Darby* case, and excused the person in question from paying the church tax.[22] In the *Pastor Green* prosecution, the ordinary courts took the position that the restriction in the right of freedom of expression in question (criminalizing incitement to hatred of homosexuals) was, in the concrete circumstances of the case,

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[20] R. Lavin, 'Högsta förvaltningsdomstolen och Europakonvention', *Förvaltningsrättslig tidskrift* (2012) p. 339-355.
[21] RÅ 2008 ref 87, RÅ, Regeringsrättens årsbok, yearbook of the Supreme Administrative Court.
[22] RÅ 1997 ref. 68.

in compliance with the constitution, but not in accordance with the ECHR as interpreted by the ECtHR. They accordingly refused to apply the criminal statute.[23]

11. Do national courts try to avoid conflicts with the ECHR by means of constitutional review or construing national law in conformity with the constitution (*Verfassungskonforme Auslegung*)?

Constitution-conform construction occurs, but has been relatively rare in Sweden. In a recently decided case the Supreme Court found a particular application of criminal law as a restriction on freedom of expression to be unconstitutional, accordingly, it interpreted the law more narrowly and acquitted the accused.[24]

12. Do national courts use EU law as a vehicle to review the compatibility of national law with the ECHR?

There are examples of cases where a right existing under the ECHR has been enforced by the national courts as part of the general principles of EU (previously EC) law. For an early example of such case, see RÅ 1997 ref. 65, concerning access to court to challenge non-payment of a farm subsidy. The court had previously held – mistakenly – that this was not a "civil right", and the existence of a wider right of access to court under EC law allowed them to grant access to court, and avoid taking up their previous error.

The existence of parallel rights under EC/EU law, which have lex superior status (according to CJEU at any rate) has *inter alia* allowed the Swedish courts to avoid applying the "clear support" evidential threshold for review on the basis of the ECtHR case law.

There is, interestingly, some very recent evidence that the Supreme Court, at least, is moving away from the "clear support" test.[25] The reasons for this are probably the fact that it is unworkable to have two different tests, one applying to review against the ECHR, and one to review against the EU Charter of Rights. In this respect, it can be noted that the Supreme Court has, following the CJEU judgment on 26 February 2013 in case C-617/10, *Åklagaren v. Fransson*, decided to take up again, this time in plenary, the tax penalty case.

13. Is there a preferential order in the use of techniques (i.e. treaty-conform interpretation, setting aside national law, ordering the legislature to amend legislation, constitutional review, *Verfassungskonforme Auslegung*) to avoid violations of the ECHR?

The main means of ensuring compliance with the ECHR is treaty-conform construction.[26] It is not possible for the courts to set aside national law or to order the legislature to amend legislation (see answer to 2.b).

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[23] NJA 2005 s. 805.
[24] NJA 2012 s 400.
[25] See NJA 2012, se. 211 and the Supreme Court judgment in B 1982-11, not yet reported.
[26] See Lavin, *supra* n. 20; K. Åhman, *Normprövning* (Norstedts 2011) p. 209, I. Cameron, 'The Influence of European Human Rights Law on National Law', in E. Hollo, ed., *National Law and Europeisation* (Helsinki 2009).

PART 3 – Dealing with the judgments and decisions of the ECtHR

14.a Do the national courts, when interpreting and applying ECHR provisions, refer to judgments/decisions of the ECtHR? If so, do they do this standardly / frequently / sometimes / rarely?
14.b. Does it make a difference if your state was not a respondent party to the case at hand? I.e., do the courts generally refer to the case law of the Court as a whole (*res interpretata* effect), or is special importance given to the judgments/decisions to which the state has been a party?

It is the two supreme courts which tend to refer most to the ECHR. They refer relatively often to cases concerning other states.

15.a. What general methods exist for the national courts to respond to such judgments (e.g. reconsidering a case after reopening; changing interpretation of national law in similar cases)?

The reopening issue has not yet arisen squarely in Sweden. Generally speaking an administrative agency has a duty to reconsider a decision it has made should new facts come to light, or where circumstances otherwise call for this, and this can be done quickly and simply and without any disadvantage to an individual.[27] Interim injunctions (*inhibition*) might conceivably be required in some cases, other than deportation cases, where there is a specific provision on the matter. As far as administrative courts are concerned, the Convention is part of Swedish law, and a lower court's failure to have regard to the Convention is grounds for appeal. Where an administrative judgment is *res judicata* (*vunnit rättskraft*), reopening it is possible under section 37b of the Administrative Procedure Act where, "because of particular circumstances, there are special reasons for doing so". The problem is where the judgment in question does not violate the Convention as such, but European Court of Human Rights case law. But the "special reasons" clause may be sufficiently widely framed to allow reopening.[28]

Reopening in civil and criminal cases is more awkward. For a court to miss, or even ignore, case law from a "higher" court is not a "fundamental error of law" so as to justify reopening.[29] On the other hand, disregarding clear case law from the European Court of Human Rights *may* be sufficiently serious to qualify for reopening as manifestly incorrect application of the law (Code of Judicial Procedure 58:1, para.4, *"uppenbart felaktig rättstillämpning"*). Although this has not yet happened, if case concerning a criminal conviction allegedly in violation of Article 6 was brought against Sweden and the Court found a violation in this case, e.g. because evidence had been used in violation of the Convention, this would likely be seen as cause for re-opening of the procedure. As already mentioned, in criminal cases, violations of the "reasonable time" requirements of Article 6 can often be taken into account at the sentencing stage where a person is convicted, or compensated for by damages where the person is acquitted.[30]

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[27] Administration Act, 1986:223, section 27.
[28] Reopening is not a remedy which needs to be exhausted before taking a case to Strasbourg but if it is applied for, and granted, in a particular case, then this will solve the issue at the national level and will usually mean that the person will no longer be a "victim" of a Convention violation. Under Swedish law reopening is categorised as an extraordinary remedy.
[29] See HD Ö 698-00, beslut 2001-10-12 and I. Cameron, 'A Survey of ECHR Case law and the question of remedies', in: I. Cameron and A. Simoni, eds, *Dealing with Integration*, Vol. 2 (Uppsala, Iustus 1998) p. 53–64.
[30] See RH 2000:96, RH 2000:98 (Rättsfall från hovrätterna, RH, Cases from the Court of Appeal). The Criminal Code already allows for adjustment of sentencing, BrB 29:5, 30:4.

The Tort Liability Act (1972:207) provides for only very limited possibilities of obtaining damages for pure economic losses from the state, let alone non-pecuniary damages (*ideellt skadestånd*), but the Supreme Court has now indicated that courts should in national proceedings for damages for alleged Convention breaches award damages even for non-pecuniary losses (and not limited to cases where people have earlier brought proceedings before the ECtHR). The ECtHR case law indicates that damages, including non-pecuniary damages should be available at the national level for *certain types* of Convention violation (primarily violations of Articles 2, 3, 5 and 6).[31] However, with the exception of cases concerning trial within a reasonable time, determining *how much* compensation should be payable, and for exactly *what*, is no easy business. Causality is a large and complicated area of the law of damages, but the idea of obtaining damages for breaches of human rights is relatively new in Sweden and so there are many un-answered questions. Changing the interpretation of national law in similar cases coming up after decisions of ECtHR has been known to occur, for example in the context of determining whether certain national institutions could be classified as a "court" or not for the purposes of Article 6 of the ECHR.[32]

15.b. Do national courts generally comply with the ECtHR's judgments against your own state?

The lower courts are, as mentioned, very cautious. The "ECHR objection" involves a uncomfortable feeling of uncertainty for the national judge. The process of interpretation of judge-made law is rather different from that of most statutory law, where, at least in Sweden, the *travaux préparatoires* are easily the most important interpretative source. The ECtHR collected case law (the ECtHR "acquis") consists of thousands of cases, from which can be distilled a large number of principles. The judge must try to realize these principles by concretizing them in the particular case. The starting point at the abstract level is simple enough, but where do you go from there? The ECHR acquis does not displace the national law. Rather the national law should be applied in the light of the acquis, through the lens of the acquis, by means of the principle of treaty-conform construction. This principle is a form of purposive (or teleological) construction. One then has not simply to *identify* the scope of the law, but actively to *develop* it, something which goes to the constitutional role of the judge. Even the Supreme court judges are cautious in this area.

15.c. Do national courts try to adapt or limit the effect of the Court's judgments against your own state, e.g. by adapting the Court's interpretation to fit in as far as possible with the national legal system and the national legal traditions?

There are examples of this. Generally speaking we would say that the courts are most comfortable with Article 6 issues, and accordingly show the greatest degree of willingness in these areas to work actively to take into account the ECtHR case law concerning other states.

16. How do courts respond to judgments/decisions of the ECtHR in cases to which the state has not been a party?
16.a. Do the national courts apply a strict 'mirror principle' approach, i.e. do they apply the Court's interpretations as carefully and strictly as possible without offering more or less protection to fundamental rights?

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[31] See I. Cameron, 'Skadestånd och Europakonventionen för de mänskliga rättigheterna', *SvJT* (2006) p. 553-588 and, in detail, H. Andersson, *Ansvarsproblem i skadeståndsrätten* (Uppsala, Iustus 2013).
[32] NJA 2002 s. 288. For a similar issue in the context of EU-law, see the CJEU's judgment in *Abrahamsson*, Case C-407/98, ECR [2000] I-5539.

16.b. Do the national courts (sometimes) provide more protection to fundamental rights, e.g. by consciously applying national constitutional provisions or interpreting the ECHR provisions in a more protective manner?
16.c. Do national courts try to adapt or limit the effect of the Court's judgments/decisions, e.g. by adapting the Court's interpretation to fit in as much as possible with the national legal system and the national legal traditions?

There is no prohibition on the Swedish courts to engage in constitutional review, but as mentioned the Swedish courts do not like doing this. In any event, the temptation for the courts to go beyond the Strasbourg case law is not strong. See, however, the answer to question 8 above.

17. How do courts deal with the ECtHR's margin of appreciation doctrine?
17.a. Do they apply the margin of appreciation doctrine in the same way as is done by the ECtHR?
17.b. If so, do the courts make careful use of the doctrine, or do they sometimes opt for an overly narrow or overly wide margin of appreciation?

There are instances where it could be argued that the courts have used something not far from the doctrine of margin of appreciation in their handling of controversial cases at national level. The most prominent example would be the recent cases on double punishment (ne bis in idem).[33] The Supreme Court and the Supreme Administrative Court have developed an evidential threshold which has an effect either analogous to giving the Swedish government or parliament a margin of appreciation or of a form of "deferential" scrutiny. If someone argues that Swedish law cannot be interpreted in conformity with the ECHR, but instead it is in violation of the ECHR, as interpreted by the ECtHR, then s/he is arguing that the law cannot be applied. However, here the Supreme Court requires clear support (*klart stöd*) for this position in ECtHR case law. The "clear support" test in effect is not unlike the effect of the margin of appreciation. The courts were saying that the Swedish system of tax penalties would not be considered contrary to the ECHR unless very clear case-law said so, more or less indicating that a case concerning Sweden would be necessary.

If the national courts fail to look at the substance of an issue, by invoking the margin of appreciation, it will be very difficult for the government in subsequent proceedings which might be brought in Strasbourg to argue non-exhaustion of domestic remedies, or otherwise convince the Court that an issue has been properly aired at the national level before it went to Strasbourg.

18.a. How intensely do courts review legislation and/or administrative decisions on conformity with the ECHR? Do they always opt for marginal / deferential review (test for manifest violation) or can the scrutiny be more strict?
18.b. If strict scrutiny is possible, which standards or factors determine the intensity of the courts' review?
18.c. If the courts can only find a violation of the Convention if it is manifest, it is conceivable that less manifest violations are accepted (so it is conceivable that the ECtHR would still find a violation if it had to decide on the case). If that were to occur, do you think the courts would accept this or would the courts then have recourse to other means to avoid a conflict with the Convention?

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[33] RÅ 2009 ref 94 and NJA 2010 s 168 and below answer to 17.

There are a few examples of intense scrutiny of administrative decisions. However, as far as concerns legislation, the "manifest" requirement which has applied generally until 2011, means a deferential approach. One of the very few examples of a finding of a violation nothwithstanding this deferential approach is the already mentioned Supreme Court judgment in NJA 2005 s 805. Here, the Swedish Supreme Court might have "erred on the side of caution" and as it found the conviction of a pastor for having, in a sermon, incited race hatred to be in violation of the ECHR. It was not absolutely clear from the existing ECtHR case law on freedom of religion/freedom of speech that the pastor should be acquitted.

As mentioned in the answer to question 17, the "clear support" rule was applied concerning *ne bis in idem* and tax penalties (*skattetillägg*). The *Zolotukhin* case clearly changes the earlier ECtHR case law on *ne bis in idem*. The ECtHR had previously found the Swedish parallel systems of criminal and administrative penalties to be compatible with the ECHR. The older case law indicates that it might be permissible to make an exception to the principle of *ne bis in idem* and impose two penalties where this is foreseeable and there is a sufficiently strong link in time and subject matter between the two penalties imposed.[34] After *Zolotukhin* (but before the Swedish legislator had a chance to investigate the issue) the question came up (in different cases) before both the Swedish Supreme Administrative Court and the Supreme Court.[35] The Supreme Administrative Court found, in a summarily reasoned judgment, that the Swedish system was not in violation of the ECHR. The majority of the Supreme Court (albeit with some misgivings) found that there was no "clear support" on the basis of ECtHR case-law that the Swedish system was in violation of the ECHR. The case shows that, where the courts are faced with making a judgment with wide-ranging implications – involving a fundamental change in the tax system – they prefer to leave the issue to the legislature. This is partly for reasons of democratic legitimacy, but probably more for reasons of institutional competence. The clear support doctrine can be criticized, inter alia because, as mentioned, the lower Swedish courts are overly cautious in using the Convention (outside of the established area of Article 6) and this doctrine provides a further excuse for the lower courts not to bother overly much about the ECHR. There is some evidence that the Supreme Court may be willing to change the "clear support" test, on the basis that it is no longer workable (see reply to question 12).

19. Do the courts make use of special interpretative techniques used by the ECtHR, such as evolutive interpretation (interpretation 'in the light of present day conditions') or consensus interpretation? If so, can you estimate if they do so standardly / frequently / sometimes / rarely?

The historical/subjective approach (relying on the *travaux préparatoires* to legislation) and the objective wording approaches to interpretation are clearly dominant in Sweden. In most cases, therefore, courts could be cautious to make to evaluative interpretations without clear support from case-ECtHR, as shown above (see the answer to question 15.b.). However, it is at the same time clear that the supreme courts have at times been more adventurous and applied national law in the light of the ECHR, as shown by the abovementioned NJA 2005 s 805 and perhaps also AD 74/2012.

20. Is the role and position of the ECtHR debated in your country? If so:
20.a. Where is the criticism mainly visible (media, politics, scholarship, court room)?
20.b. What kind of criticism is usually voiced (complaints about expansion of scope; quality of judgments; independence and impartiality of judges; disrespect for national sovereignty; insufficient knowledge of national law; etc)?

[34] *Nilsson v Sweden*, ECtHR 13 December 2005, appl. no. 73661/01.
[35] RÅ 2009 ref. 96, NJA 2010 s. 168 I–II.

20.c. If there is any criticism, is this a new development? When did the criticism first become apparent? Can you explain what gave rise to the criticism?
20.d. Does the criticism affect the status of the ECHR and the ECtHR's judgments/decisions in judicial decision making? If so, what concrete effects does this have (e.g. more frequent references to the margin of appreciation doctrine, more references to national constitutional law, restrictive interpretation of ECtHR judgments/decisions, disapplying the ECHR in favour of national (constitutional) law)?

The ECtHR is seldom if ever criticized in the media. Following the tax penalty case (above) there has been scholarly criticism of the courts as well as the government for inactivity in establishing a commission of inquiry to determine the changes which need to be made in the tax laws and criminal/administrative procedure (these are, admittedly, complicated issues). There is also some criticism of the ECtHR within the courts for changing its case-law in a unforseeable way and delivering decisions that are difficult to apply in a national context. The above mentioned case-law on "clear support" for rulings against well-established Swedish legal regimes that may be contrary to the ECHR might be seen as a consequence of this criticism.[36]

21. Are there any intentions at the political level to amend the constitution or legislation in order to change the courts' competences in relation to the interpretation and application of the ECHR?

No. As mentioned, the "manifest" requirement for constitutional review was deleted in 2011. The "clear support" doctrine is a creation of the Supreme Court and there is no sign that it will be changed.

PART 4 – Access to information and judgments

22. To what extent do national judges have access to and knowledge of the ECHR and the case law of the ECtHR?
22.a. Are judges trained to apply the ECHR, either in law schools or in professional training?

Yes. The ECHR is a part of the public law course at law school, and an obligatory part of judicial training.

22.b. How is information about the judgments/decisions of the ECtHR made available to the courts?
22.c. Are important judgments/decisions of the ECtHR available in the national language, e.g. because the government provides translations?

Swedish summaries of judgments in cases against Sweden, with link to full text in English, are available at www.manskligarattigheter.se/sv/manskliga-rattigheter-i-sverige/europadomstolens-domar-i-mal-mot-sverige. Swedish summaries of other important cases (in fact, translations of the Court's monthly summaries) "Nytt från Europadomstolen" are available at the website of the National Courts Administration www.domstol.se/Ladda-ner--bestall/Nytt-fran-Europadomstolen/. However, these only go up to 2010. It is unclear if these will continue to be published.

[36] See, e.g. Lavin, *supra* n. 20.

22.d. Do you think there is an impact on the use of ECtHR judgments/decisions by national courts of the fact that they are usually only available in English and French?

Yes, but judicial cultural reasons for not wanting to go into detail on the ECtHR case law are stronger than the mere unfamiliarity with the language. When Swedish courts refer to the ECHR, they have very often referred to the case(s) as referred to in the standard textbook on the Convention in Swedish, Hans Danelius book, *Mänskliga rättigheter i Europeisk praxis*. More frequently, however, the courts refer to the original source. All (or almost all) Swedish judges speak English, but few speak French. The language of court proceedings is Swedish – any party to the proceedings can insist upon all proceedings being in Swedish.

23. Are national judgments/decisions in which the ECHR plays a role available electronically? Are they translated into English?

All judgments are available on demand in pdf format, but the judgments of district courts/district administrative courts are not published in any official series. Only a selection of appeal court/administrative court of appeal judgments are published in official series, or on the National Courts Administration website “leading cases”. Only the Supreme Court/Supreme Administrative Court judgments and decisions are generally published (and not all of these either). A few cases concerning Swedish courts interpretations of the ECHR have been published in the already mentioned “Nytt från Europadomstolen” www.domstol.se/Ladda-ner--bestall/Nytt-fran-Europadomstolen/. To our knowledge, only one case has been officially translated into English, the Pastor Green case.

PART 5 – Concluding questions

24. To what extent do you think there is a connection between, on the one hand, the main features and characteristics of your constitutional system and the status of international law in the national legal system and, on the other hand, the impact of the ECHR and the judgments of the ECtHR on national case law?

There is a very strong connection. The main emphasis in Sweden is on the legislative process as a mechanism for protection of human rights. The impact of the ECHR on judicial culture is developed inter alia in the attached publication by one of the authors. An article dealing generally with the Swedish system for protection of rights by one of the authors is also attached. A further article on the legislative process as a mechanism for protection of human rights by both authors is in the process of publication (and can be sent later).

25. How does the application of the ECHR in the case law of the states relate to the role of national fundamental rights (e.g. constitutional rights)?

See the answer to question 24.

26. To what extent do you think that debates on the role of the ECtHR and its judgments have an impact on national case law?

There is little debate about the *raison d’être* of the ECtHR. There has been some criticism by senior judges that the ECtHR is “wasting its time” on unimportant matters, but little that it is “interfering” inappropriately in the Swedish legal order. In general our impression is that the ECtHR as a whole is regarded positively within the legal profession in Sweden and that courts on all levels have become more and more used to include issues of human rights into their reasoning. A clear example is the

decision of the Administrative Court of Appeal in Stockholm's judgment in December 2012 that the Swedish law on sex-change was contrary to the ECHR as it demanded an obligatory sterilization of the person applying for sex-change.[37]

[37] Case 1968-12, decided on the 19th of December 2012.

UNITED KINGDOM

Roger Masterman

PART 1 – The status of international law in the national constitutional system

1. Can you briefly characterise your national constitutional system? Please pay attention to matters such as:

- **Character of the state (monarchy, republic, ...)**
- **System of government (parliamentary, presidential, ...)**
- **Character of the constitution (written, unwritten)**
- **System for and extent of separation of powers (both horizontal (trias politica), and vertical (federation vs. unitary state, decentralisation or devolution))**
- **Main sources of fundamental rights**

The United Kingdom operates under a parliamentary (Westminster) system of government. While the monarch is Head of State, it is Parliament that is the dominant legal entity, with supreme (sovereign) law-making competence; the doctrine of parliamentary sovereignty 'is (from a legal point of view) the dominant characteristic of [the United Kingdom's] political institutions.'[1]

The constitution of the United Kingdom is 'unwritten' or – more accurately – 'non-codified.' Constitutional norms are derived from a range of sources including statute, common law, prerogative, constitutional convention and – more recently – from extra-jurisdictional sources such as the European Union and ECHR.

Historically, there has been no clear separation of powers between the three branches of government. The structural hallmark of the Westminster model of government is the 'fusion'[2] of the executive and legislative branches and, as such, the core executive (Cabinet) is drawn from the ranks of the bicameral legislature (Parliament).[3] The lack of a codified constitution and pervasive influence of the parliamentary sovereignty doctrine has also resulted in a lack of clarity, or precision, in the allocation of governmental functions. A basic separation is said to exist:

> 'It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.'[4]

A more exacting division of governmental functions has, however, proved elusive.[5]

Judicial independence has, though, been protected by statute since at least the Act of Settlement 1701 (which provides that senior judges should hold office *quamdiu se bene gesserint* and should be re-

[1] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (Indianapolis, Liberty Fund 1982) ch.1, p.3.
[2] W. Bagehot, *The English Constitution* (Oxford World's Classics edition) (Oxford, Oxford University Press, 2001) p.11.
[3] The two Houses of Parliament are the House of Commons (comprised of 650 MPs, directly-elected from single member constituencies) and the House of Lords (comprised of 761 largely-appointed Peers). The House of Commons is the dominant chamber, legally and politically.
[4] R v. Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513, 567 (Lord Mustill).
[5] G. Marshall, *Constitutional Theory* (Oxford, Clarendon Press, 1971) ch. 5.

movable only on an address to both Houses of Parliament). The judiciary has not, however, been historically regarded as being a fully-autonomous branch of government.

Two particular obstacles can be cited as evidence of significant (structural, though now historical) obstacles to the notion of an independent judicial arm – or branch – of government: (i) the office of Lord Chancellor (a member of the Executive, Speaker of the House of Lords and Head of the Judiciary in England and Wales) and (ii) the Appellate Committee of the House of Lords (until 2009 the United Kingdom's apex court was technically a Committee of the House of Lords comprising peers – Lords of Appeal in Ordinary – appointed to undertake the judicial functions of the House under the Appellate Committee Act 1876). The Constitutional Reform Act 2005 largely removed judicial functions from the powers of the Lord Chancellor and saw an institutionally separate United Kingdom Supreme Court established.

The Westminster model of government is traditionally associated with a strong, centralised, administration. However, since 1999, power has been devolved from Westminster to administrations in Scotland, Wales and Northern Ireland.[6] Though the devolved Parliament – in Scotland – and Assemblies – in Northern Ireland and Wales – are legally limited legislatures (their powers are both allocated and defined by primary legislation) there is some debate over the extent to which their democratic and representative nature confers characteristics which would otherwise be associated with sovereign institutions.[7] In addition, constitutional conventions have emerged safeguarding the devolved areas of competence from unilateral interference by the (technically sovereign) United Kingdom Parliament.

The union between England, Scotland, Wales and Northern Ireland therefore remains intact, but the notion of the unitary state has been modified as a result of the quasi-federal dynamics of devolved government.

Protection for fundamental freedoms can be found in both primary legislation (positive, statutory, rights) and in decisions taken at common law (civil liberties). Until the implementation of the Human Rights Act 1998 (hereafter HRA) there existed no general constitutional or statutory instrument (equivalent in content, if not status, to a Bill of Rights) allocating individual rights. Domestic protection for fundamental rights was therefore, historically, piecemeal, relying on specific legislation and judicial decisions rather than a single overarching instrument.

The United Kingdom has been a signatory to the ECHR since 1951 and has permitted the right of individual petition to the European Court of Human Rights – following the exhaustion of domestic remedies – since 1966. In the absence of primary legislation giving domestic effect to the Convention rights, the ECHR protections could only be relied on domestic adjudication in limited circumstances – for instance, in the event of an ambiguity in primary legislation.[8]

The mid- to late-1990s saw the judicial articulation of a species of rights recognised at common law. These 'fundamental constitutional rights' (for instance, the right of access to a court[9] and freedom of expression[10]) functioned as restraints on the ability of Parliament to inadvertently legislate in contravention of a right so recognised. This common law 'principle of legality' was fully articulated by Lord Hoffmann in the House of Lords decision in *Simms*:

[6] See: Scotland Act 1998; Scotland Act 2012; Northern Ireland Act 1998; Northern Ireland (St Andrews Agreement) Act 2006; Northern Ireland Act 2009; Government of Wales Act 1998; Government of Wales Act 2006.
[7] See e.g. *AXA General Insurance Ltd* v. *Lord Advocate* [2011] *UKSC* 46 at [46], [49]; *Adams* v. *Scottish Ministers* 2003 *SC* 171, at [62]: '[an Act of the Scottish Parliament is] of a character which has far more in common with a public general statute than with subordinate legislation.'
[8] R v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696.
[9] R v. Lord Chancellor, ex parte Witham [1998] QB 575.
[10] R v. Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115.

> '… parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'[11]

Since coming fully into force in 2000 the HRA has provided for certain of the ECHR rights to be given legal effect in the United Kingdom. The Convention rights given effect under section 1(1) of the HRA are enforceable against public authorities (section 6(1)), and against private bodies exercising public functions (section 6(3)(b)), and are to be used as interpretative aids to ensure the compatibility of primary legislation with the Convention requirements (section 3(1)).

The Convention rights are *not* directly enforceable against the legislature (section 6(3)). The HRA provides the courts with no power to strike down legislation, instead permitting only declarations of incompatibility to be issued by courts in respect of primary legislation which cannot be interpreted in a way which will achieve compatibility with the Convention rights.

It should be noted that the HRA also encourages 'political rights review' to be built into the policy-making and legislative processes. Section 19 HRA requires that, upon introducing a bill into Parliament, the responsible minister make a statement certifying the compatibility of the proposed legislation with the Convention rights, or a statement indicating that – though doubts may exist over the compatibility of the proposal with the Convention rights – the Government nonetheless wishes to proceed with the Bill.[12] Section 19 is designed to ensure that the potential impact of government initiatives on the Convention rights is explicitly built into *both* the policy-making and legislative processes. Since 2001 the parliamentary Joint Committee on Human Rights has also carried out an oversight and scrutiny role, examining matters relating to human rights in the United Kingdom and the rights implications of legislative proposals and remedial orders proposed under section 10 HRA.

The HRA therefore promotes a model of rights protection which places burdens on both the judicial and elected branches to scrutinise government and legislation on the basis of the Convention rights. The HRA is therefore a statutory bill of rights adhering to the 'new Commonwealth model'[13] of constitutionalism on the basis that it seeks to occupy a middle ground between the traditional understanding of parliamentary sovereignty and judicial supremacy over questions of rights.

2.a. To what extent are the national courts (and/or non-judicial bodies, such as Councils of State) empowered to review the compatibility of acts of parliament and other legislation with the constitution?

2.b. If they are competent to do so, what system of constitutional review is used, i.e.:

- **a system of concentrated review (with a constitutional court having the final say on the interpretation of the constitution)**

[11] R v. Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, 131.

[12] This latter course of action has been infrequently used. For one notable example, see the Communications Act 2003 (which banned political advertising on television) and the subsequent decision of the House of Lords in *R (on the application of Animal Defenders International)* v. *Secretary of State for Culture, Media and Sport* [2008] *UKHL* 15.

[13] See S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' 49 *American Journal of Comparative Law* (2001) p. 707. See also S. Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism' 8 *International Journal of Constitutional Law* (2010) p. 167.

- **a decentralised system (where all courts have the power to decide on the constitutionality of acts of parliament)**
- **anything in between?**

2.c. If they are competent to do so, is there:

- **a system of *a priori review*, i.e. review of compatibility before an act is adopted by parliament (e.g. advice by the Council of State)**
- **a system of *ex post* review**

If so, what kind of procedures are in place:

- **abstract and/or concrete control of norms by direct appeal?**
- **abstract or concrete control of norms by means of preliminary questions?**
- **a combination of *a priori* and *ex post* review?**

The United Kingdom consists of three separate legal jurisdictions with distinctive court structures; (i) England and Wales; (ii) Northern Ireland; and (iii) Scotland. The highest court in the United Kingdom is the United Kingdom Supreme Court. The Supreme Court is a court of general jurisdiction; it is the final court of appeal for civil and criminal cases arising in England and Wales, and Northern Ireland, and the final court for civil appeals only originating in Scotland.

Within the United Kingdom Constitution the courts enjoy no general power to invalidate, or otherwise question the validity or legality, of primary legislation; in the words of Ungoed-Thomas J in *Cheney* v. *Conn*:

> 'What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal.'[14]

Two important qualifications to this orthodox approach to the *ex post* review of primary legislation arise in respect of directly effective principles of EU law, and the ability of higher courts to declare legislation incompatible with the Convention rights under the HRA (both are considered below).[15]

Legislation passed by the devolved legislatures in Wales, Scotland and Northern Ireland *may* be the subject of judicial review proceedings. The devolved legislatures are legally limited, and legislation which is *ultra vires* (either for the reason that it is contrary to EU Law, contrary to the requirements of the Convention Rights, or for the reason that it interferes with an area of competence reserved to Westminster) may be struck down. The devolution Acts provide that the legality of devolved legislation might be judicially-assessed prior to, or following, enactment.

3.a. Can you briefly characterise the status of international law (treaties, decisions/resolutions by international organisations, customary international law) in the constitutional order? Do treaties, decisions/resolutions by international organisations and/or customary law form part of the law of the land?
3.b. If so, what rank do treaties, decisions/resolutions adopted by international organisations and/or customary international law have in the national hierarchy of norms? Is there some kind of hierarchy?

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[14] *Cheney* v. *Conn* [1968] 1 *WLR* 242, 247. See also *Pickin* v. *British Railways Board* [1974] *AC* 765.
[15] While there is debate over whether review under the HRA should be considered to be a species of constitutional review (see A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press 2009), judicial review under the HRA is against a series of positive rights rather than as against the constitution as such.

3.c. If international law is not part of the law of the land, what guarantees are there that the state will comply with its international obligations under treaties, decisions/resolutions by international organisations, or customary international law?
3.d. Do the competent courts apply treaties, decisions/resolutions adopted by international organisations and/or customary international law as such (i.e. as sources of international law) or are they transformed into sources of national law in the process of incorporation? Are there any differences in practical consequences between the different approaches? Or is this a mere academic question without practical consequences?
3.e. Would you characterise your constitutional system as monist, dualist or a hybrid system?

The United Kingdom is formally a dualist system. On the orthodox account, provisions of international law,[16] unincorporated treaties[17] and resolutions taken by international organisations[18] will not be given effect in domestic litigation even though they may be binding upon the state itself. Such an approach is attributable to, and in accordance with, the position held by parliamentary sovereignty in the United Kingdom constitution:

> '[I]f domestic legislation clearly conflicts with a treaty obligation which has not been statutorily incorporated into domestic law, the courts are constitutionally bound to give effect to the domestic provision, even though this involves a breach of the state's obligations in international law.'[19]

Exceptions to the orthodox dualist approach, however, do exist. International law obligations may guide the judicial interpretation of statute in the event of an ambiguity; the courts will assume that Parliament intended to legislate compatibly with the United Kingdom's obligations in international law,[20] may consider international law where 'statute requires decisions to be taken in accordance with an international treaty,'[21] and have made reference to general principles of international law when asked to construe the meaning and effect of non-incorporated provisions of the ECHR.[22]

The domestic influence of customary international law is also slightly at tension with the prevailing dualist approach. Historically, customary international law was declared to be a part of the common law.[23] More recent judicial decisions – taken in the light of the significant expansion of the reach of customary international law – have considered that obligations arising out of customary international law are a part of domestic law only to the extent that they can be clearly ascertained[24] and to the extent that their enforcement via the common law would not require the courts to exercise illegitimate law-making powers.[25]

Significant obligations arising under treaty agreements have, in practice, been given effect in national law via statute; the European Communities Act 1972 and Human Rights Act 1998 provide the

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[16] *Mortensen* v. *Peters* (1906) 14 *SLT* 228.
[17] *Cheney* v. *Conn* [1968] 1 *All ER* 779.
[18] R (on the application of the Campaign for Nuclear Disarmament) v. Prime Minister and others [2002] EWHC 2777 (Admin) at [61].
[19] M. Hunt, Using Human Rights Law in English Courts (Oxford, Hart 1997) p. 7.
[20] R v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696.
[21] R (on the application of the Campaign for Nuclear Disarmament) v. Prime Minister and others [2002] EWHC 2777 (Admin) at [61]. And see Occidental Petroleum v. Ecuador [2005] EWCA Civ 1116; [2006] 2 WLR 70.
[22] *R (on the application of Al-Skeini) v. Secretary of State for Defence* [2007] *UKHL* 26; [2008] 1 *AC* 153 (on the interpretation of the term 'jurisdiction' in Article 1 ECHR).
[23] W. Blackstone, *Commentaries on the Laws of England*, 1st edn. (Oxford, Clarendon Press 1765-1769) Vol. IV, 67.
[24] See R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport [2004] UKHL 55; [2005] 2 AC 1 at [24]-[27] (Lord Bingham).
[25] See e.g. *R* v. *Jones (Margaret) and Others* [2006] *UKHL* 16; [2007] 1 *AC* 136 (in which the House of Lords declined to recognise that 'international crimes of aggression' formed a part of the common law on the basis that the creation of criminal offences should be a matter for the legislature).

best examples. Even so, in the event of domestic implementation by statute, the nature of the obligation arising might not be readily described as 'incorporation':

> '[I]t is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them ... Parliament may pass a law which mirrors the terms of the treaty and in this sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law.'[26]

The extensive influence of both European Union and European Convention jurisprudence has diluted the traditional dualist orthodoxy, to the extent that some commentators suggest that domestic law should be interpreted in the light of the United Kingdom's international obligations (even in the absence of statutory incorporation). [27]

4. To what extent and how are the national courts empowered to review the compatibility of the constitution, acts of parliament, lower legislation, and other decisions taken by public authorities with treaties, decisions/resolutions adopted by international organisations and/or customary international law?
If they are:
4.a. Are all courts competent to do so (i.e. a decentralised system of judicial review) or is the competence limited to designated judicial bodies (e.g. a constitutional court or the highest courts)?
4.b. Are the courts competent to give priority to international law if national law conflicts with treaties, decisions/resolutions adopted by international organisations and/or international customary law? If so:

- **Is this competence based on national (constitutional) law? Or is it inferred from the nature of international law (e.g. the nature of self-executing treaties or the principle of *pacta sunt servanda*)?**
- **Which formal competences do the courts have to give such priority (e.g. disapplying national law in the case at hand, declaring national law null and void)?**
- **Is there a difference between priority over legislation/acts of parliament and priority over the constitution?**
- **Does declaring an act null and void have *ex tunc* effect or *ex nunc* effect, or is it possible for the court to set a time limit for the legislature to make amendments before the act loses its legal effect?**

Courts are formally permitted to review the compatibility of Acts of Parliament with the requirements of provisions of international law – including treaty obligations – only to the extent permitted by primary legislation. The two core examples of this can be found in the provisions (as interpreted) of the European Communities Act 1972 and in the provisions of the HRA 1998.

EU Law has effect in the United Kingdom as a result of the European Communities Act 1972. In order to vindicate the supremacy of EU Law, in the event of a clash between a domestic statute and directly effective provisions of EU Law, United Kingdom courts are empowered to 'disapply' the offending provisions of primary legislation.[28]

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[26] *R* v. *Lyons* [2002] *UKHL* 44; [2003] 1 *AC* 976 at [27].
[27] R. Singh, 'The Use of International Law in the Domestic Courts of the United Kingdom' 56 *Northern Ireland Legal Quarterly* (2005) p. 119 at p. 122.
[28] R v. Secretary of State for Transport, ex parte Factortame (No.2) [1991] 1 AC 603.

That the obligations imposed by EU law are, in this sense, only applicable in the domestic system as a result of primary legislation is emphasised by section 19 of the European Union Act 2011: '[d]irectly effective or directly applicable EU Law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act…'

As a result of the HRA 1998, higher[29] domestic courts enjoy competence to issue declarations of incompatibility in the event of a conflict between primary legislation and the Convention rights (section 4(2) HRA). The issue of a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement' of the provision(s) in respect of which it is made (section 4(6) HRA). The issue of a declaration of incompatibility under the HRA does not compel the executive or legislature to enact remedial legislation to address the incompatibility – and is not therefore regarded as an 'effective remedy' for the purposes of the Convention organs[30] – but instead places the elected branches of government under political pressure to remedy the apparent breach.

In the absence of specific statutory direction, courts may nonetheless be guided in their interpretation of domestic law by the United Kingdom's international law obligations where there is an ambiguity in the domestic statute or where the common law is unclear.[31]

5. Can parliament and/or the government play a role in determining whether an act of parliament which has been already been enacted and entered into force is compatible with the constitution and/or international law?

The Government may be invited to join proceedings in which the compatibility of a statute with the Convention rights is at issue; section 5 HRA permits the Crown – defined to include a Minister of the Crown, Member of the Scottish Executive or Northern Ireland Executive – the ability to intervene in proceedings, and make arguments relating to the Convention rights, in which a court is considering issuing a declaration of incompatibility. The court retains ultimate discretion over whether a declaration of incompatibility should be issued.

PART 2 – Competences and techniques of national courts to apply the ECHR (or avoid violations of the ECHR from occurring)

6.a. Do all the substantive provisions of the ECHR (including the various substantive protocols) have direct effect, i.e. are they self-executing/directly applicable?
6.b. To the extent that the substantive provisions of the ECHR and its Protocols are considered to be self-executing / directly applicable / have direct effect, does this ipso facto mean that these provisions result in subjective rights enforceable before the national courts? Or are there any substantive provisions that are considered to be self-executing, but may not result in subjective rights? If so, please give examples.
6.c. If some of the substantive provisions of the ECHR and its Protocols are considered to be of such a nature that they can only be implemented by means of legislative measures, are the national courts nevertheless competent to apply those provisions to establish state responsibility in cases where those provisions have been violated?
If so, which remedies are possible? E.g.:

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[29] Essentially, the High Court, Court of Appeal, Judicial Committee of the Privy Council, and United Kingdom Supreme Court.
[30] Burden v. United Kingdom (2008) 47 EHRR 38.
[31] R v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696.

- **Are the national courts competent to order the state or its bodies to compensate for the damage caused by violations of non-self-executing provisions of the ECHR and its Protocols?**
- **Are the national courts competent to order the State to adopt (legislative) measures which are necessary to implement non-self-executing provisions of the ECHR and its protocols?**

Specified provisions of the ECHR are given legal effect in the United Kingdom as a result of the HRA 1998. Those provisions given effect are detailed in schedule 1 to the HRA to include: Articles 2-12, 14, 16, 17, 18, Articles 1-3 of Protocol No.1, Article 1 of Protocol No.13.

While the Convention rights are not 'incorporated' fully into domestic law – in the sense that they are free-standing norms of general application – this has not prevented domestic courts from applying them directly as standards of legality against which the actions (and inactions) of public bodies can be tested (section 6 HRA) and on the basis of which primary legislation can be subject to review (section 3 HRA). In order to assert a Convention right against a public authority the applicant must be regarded as a 'victim' of the alleged contravention of the Convention right, or rights (section 7(1) HRA).

A number of the provisions of the Convention were, however, omitted from the Articles scheduled to the HRA. Article 1 ECHR was not included for the reason that it was felt to impose an obligation on the state as a whole while Article 13 ECHR – the right to an effective remedy – was similarly omitted due to the inclusion of a specific remedies clause in the HRA (section 8 HRA). Article 15 ECHR is not included in the provisions scheduled to the HRA, though contains a domestic parallel in section 14 HRA.

In the event that compliance with the Convention requires legislative action, domestic courts are unable to compel government to introduce remedial legislation. While the absence of Article 13 has otherwise not 'posed a significant hurdle in the way of the courts' ability to give effective protection to the Convention rights in domestic law'[32] courts are not competent to require the enactment of legislation designed to bring the United Kingdom into conformity with the requirements of the Convention. Should it be impossible to interpret existing legislation in a manner which would achieve compatibility with the Convention the courts' powers are limited to the making of a (non-binding, non-enforceable) declaration of incompatibility; as Laws LJ noted in *R (on the application of Chester)* v. *Secretary of State for Justice*:

> 'Under the Human Rights Act 1998 the minister has no obligation to act on a declaration of incompatibility. If he does not, the complainant's remedy is to take proceedings in Strasbourg where he will be able to deploy the domestic court's judgment to the effect that his Convention rights have been violated. And failure by a member state of the Council of Europe to give effect to a decision of the European Court of Human Rights sounds at the political level; it is not as such amenable to sanctions in the national courts.'[33]

7. The case law of the ECtHR includes (positive) obligations on national courts to apply the Convention in relations between private parties (i.e. in horizontal relationships). Courts must refrain from interpreting contractual obligations in violation of the ECHR (*Khurshid Mustafa & Tarzibachi*, *Pla & Puncernau*). When deciding on horizontal conflicts between rights (e.g. the right to freedom of expression and the right to respect for one's reputation) they have to take account of the ECHR, and sometimes they are required to interpret national law in a specific manner (e.g. family law cases should always be decided in concreto, taking the best interests

[32] J. Beatson, S. Grosz, T. Hickman, R. Singh and S. Palmer, *Human Rights: Judicial Protection in the United Kingdom* (London, Sweet and Maxwell 2008) p.37.
[33] R (on the application of Chester) v. Secretary of State for Justice [2010] EWCA Civ 1439; [2011] 1 WLR 143 at [27].

of the child into account). Do the national courts indeed apply the relevant ECHR provisions (or the corresponding provisions of the incorporating act) to cases between private parties, in compliance with the case law of the ECtHR?

Though the HRA is silent on the specific question of whether the Convention Rights should apply in litigation between private parties (horizontally) the Act is of practical horizontal utility.

Where the relevant area of law is governed by statute, the Convention Rights (indirectly) apply horizontally for the reason that section 3(1) HRA draws no distinction between private and public law disputes, simply declaring that all 'primary legislation and secondary legislation must be read and given effect in a way which is compatible with the Convention rights.' As a result, section 3(1) has been relied on in cases dealing with, inter alia, landlord and tenant disputes,[34] contractual disputes,[35] and employment law.[36]

At common law, the Convention rights have indirect horizontal effect as a result of section 6 HRA. The Convention rights are not explicitly made applicable as between private parties. However, as the courts are deemed to be public authorities under the provisions of the Act, they are placed under an obligation not to act incompatibly with the requirements of the Convention. This has been interpreted to mean that, in giving effect to the common law, courts should seek to apply (and develop) the law in a way which is compliant with the Convention rights.[37]

The most significant developments in this field have seen the modification of the common law breach of confidence doctrine into a remedy capable of protecting against disclosures of private information by the press.[38] The breach of confidence remedy – renamed post-*Campbell* v. *Mirror Group Newspapers* as the tort of 'misuse of private information' – has been the vehicle via which the protections afforded by Article 8 (and those afforded by Article 10) have been accommodated into the domestic common law.

The development of the common law's ability to offer protection to personal privacy has been singularly pronounced; in other areas of the common law the influence of the HRA has been far less marked.[39]

8. Are there examples of cases in which national legislation or national decisions have been set aside / declared null and void / disapplied because of a conflict with the ECHR?
8.a. Can you estimate if this occurs frequently / sometimes / rarely?
8.b. If constitutional review is possible: can you estimate if the constitution is used more often / just as often / less often than the ECHR as a basis for holding that legislation or decisions do not comply with fundamental rights norms?
8.c. Are there any examples where the court has declined to use its competence to set aside national legislation / decisions in order to respect separation of powers (between the courts

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[34] See Ghaidan v. Godin-Mendoza [2004] UKHL 30.
[35] See Wilson v. First County Trust [2003] UKHL 40.
[36] See *X* v. *Y* [2004] *EWCA Civ* 662.
[37] Though it should be noted that considerable disagreement exists over the precise obligations imposed on the judiciary in this respect (compare: M. Hunt, 'The "Horizontal Effect" of the Human Rights Act 1998' *Public Law* (1998) p. 423; G. Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A bang or a whimper?' 62 *Modern Law Review* (1999) p. 824; W. Wade, 'Horizons of Horizontality' 116 *Law Quarterly Review* (2000) p. 217).
[38] See Campbell v. Mirror Group Newspapers [2004] UKHL 22; [2004] 2 AC 457.
[39] See J. Steele, '(Dis)owning the Convention in the Law of Tort' in J. Lee, ed., *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Oxford, Hart Publishing 2010).

and the legislature or between courts and administrative bodies) or the sovereignty of parliament?

The HRA does not empower courts to declare statutes to be null and void. If a higher court finds that it is not possible to interpret primary legislation in a way which is compatible with the Convention rights it may choose to issue a 'declaration of incompatibility' under section 4 HRA. The effect of such a declaration is to highlight an inconsistency between domestic law and the requirements of the Convention rights, but to leave the decision over how – or whether – the inconsistency should be remedied to the executive and legislature.

As a matter of law, then, courts under the HRA do not enjoy competence to compel the legislature to bring national law into conformity with the Convention rights; a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement' of the provision(s) in respect of which it is made (section 4(6) HRA).

Such a declaration is therefore designed to respect, rather than undermine, the United Kingdom's particular separation of powers as it reserves the choice over whether to amend judicially-declared incompatible legislation to Parliament. Parliamentary sovereignty is – at least formally – upheld under the terms of the HRA.

However, numerous declarations of incompatibility have been issued in respect of legislation deemed to be inconsistent with the requirements of the Convention rights. Amongst the most notable are:

– *R (on the application of Anderson)* v. *Secretary of State for the Home Department* [2002] UKHL 46 which saw the Crime (Sentences) Act 1997, section 29, declared incompatible with Article 6 ECHR on the basis that the Home Secretary (who was empowered by the Act to set the custodial tariff to be served by adults convicted of murder) was not an independent and impartial tribunal. The incompatibility was remedied by the passing of the Criminal Justice Act 2003 (sections 303(b)(i), 332, schedule 37, part 8).

– *Bellinger* v. *Bellinger* [2003] UKHL 21 which saw section 11(c) of the Matrimonial Causes Act 1973 declared incompatible with Articles 8 and 12 on the basis that the law as it stood could not extend to recognising a marriage between two people who were of the same sex at birth. The incompatibility was remedied by the Gender Recognition Act 2004.

– *A* v. *Secretary of State for the Home Department* [2004] UKHL 56 in which provisions permitting the indefinite detention without trial of non-nationals suspected of terrorist offences (contained in the Anti-Terrorism, Crime and Security Act 2002) were declared incompatible with Articles 5 and 14. The legislative response came in the Prevention of Terrorism Act 2005, itself the subject of subsequent litigation relating to Convention compliance.[40]

The Ministry of Justice publishes statistics relating to the overall number of declarations of incompatibility issued by the higher courts under the HRA; the total number (including those subsequently overturned on appeal) stands at 27.[41]

[40] See Secretary of State for the Home Department v. MB [2007] UKHL 46; [2008] 1 AC 440.
[41] www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf, visited March 2013.

The courts do however have power to declare administrative/executive decisions to be *ultra vires* on the basis of an incompatibility with the Convention rights (section 6 HRA). In practice, this happens relatively frequently, though – as covered below – the courts may recognise that a degree of deference may be due to such decisions on the basis of the relative institutional competence of the primary decision-maker.

9. Are the national courts competent to order the national legislature to bring national law into conformity with the ECHR by means of amending or introducing legislation?

While under the HRA, the higher courts enjoy no competence to strike down or invalidate legislation, the precise coercive effect of a declaration of incompatibility on the elected branches of government, however, remains a point of contention. The effect of a declaration of incompatibility is, at the least, to alert the elected branches to a potential breach of the Convention and to leave the decision of how (and indeed whether) to address the inconsistency with the executive and Parliament. There is evidence that the intention of the enacting government was that the issue of such a declaration would – in all but extreme circumstances – prompt a legislative response.[42]

As a matter of constitutional practice all but one of the declarations which have become final (that is, have not been overturned on appeal) have been addressed in subsequent primary legislation or through use of the 'remedial order' procedure contained in section 10 HRA.[43] While some commentators have been able to point to the existence of a 'practice' under which the 'elected branches do not reject'[44] declarations of incompatibility there is insufficient evidence to date to establish a binding convention in this regard.[45]

The significant exception to this trend of positive action in response to section 4 declarations can be found in the ongoing saga relating to prisoner voting rights. The relevant provisions of the domestic legislation – the Representation of the People Act 1983 – were declared to be incompatible with the requirements of Article 3 of Protocol No.1 in the 2007 decision in *Smith* v. *Scott*[46] on the basis of the prior decision of the European Court of Human Rights in *Hirst* v. *United Kingdom (No.2)*.[47] Since then – and in spite of repeated consultation exercises and the decision of the European Court of Human Rights in *Greens and MT* v. *United Kingdom*[48] – the United Kingdom Government and Parliament have resisted the pressure to bring domestic law in line with the requirements of the Convention.

10. Do national courts strive to interpret national law (including the national constitution) in harmony with the ECHR?

Section 3(1) HRA directs courts to interpret primary and secondary legislation in order to achieve compatibility with the Convention rights so far as it is possible to do so. While the HRA is – as indicated above – silent on the precise relationship between the Convention rights and the common law, the courts have (broadly) sought to interpret the common law in compliance with the requirements

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[42] HC Debs, Vol.317, Col.1301 (Jack Straw MP).
[43] A so-called Henry VIII clause which permits primary legislation to be modified by secondary legislation.
[44] A. Kavanagh, 'Deference or defiance? The limits of the judicial role in constitutional adjudication' in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, Cambridge University Press 2008) p. 214.
[45] Burden v. United Kingdom (2008) 47 EHRR 38.
[46] 2007 *SC* 345.
[47] Hirst v. United Kingdom (No.2) (2007) 42 EHRR 41.
[48] (2011) 42 *EHRR* 41. See also the decision of the Grand Chamber of the European Court of Human Rights in *Scoppola* v. *Italy*, ECtHR 22 May 2012, appl. no. 126/05.

of the Convention. In both respects therefore, the courts seek to interpret national law in harmony with the Convention.

The changes brought about to the techniques of statutory construction as a result of the HRA can be seen to operate at two levels. At the general level, the HRA is judicially-regarded as enjoying constitutional status.[49] Two consequences flow from this. The first is that the HRA is, as a so-called 'constitutional statute', immune from implied repeal (i.e. will not be overridden by subsequently-enacted, contrary, legislation unless by express direction).[50] The second is that, as a constitutional measure, the HRA is entitled to be interpreted using 'generous and purposive' methods of construction in order to fully vindicate the rights to which it gives further effect.[51] For a jurisdiction in which the judicial method has traditionally been characterised by formalist and/or literal approaches to statutory construction,[52] recognition of specific methods of 'constitutional' interpretation is a significant development.

In the specific application of section 3(1) HRA this 'generous and purposive' approach to the interpretation of statutes can be most readily observed in the technique of reading words or provisions into statutes in order to achieve compatibility with the Convention rights ('reading in'). 'Reading in' permits judges to infer words, phrases, or perhaps even provisions, into the text of statutes in order to render them Convention compliant. In the leading case of *Ghaidan* v. *Godin-Mendoza*, for instance, a majority of the House of Lords was able to interpret the words 'as his or her wife or husband' to read '*as if they were* wife or husband' in order to extend protections found in the Rent Act 1977 to same-sex couples (and to avoid an incompatibility between that legislation and Articles 8 and 14 of the Convention).[53]

'Reading down' also involves a departure from literalist techniques of statutory construction by permitting courts to adopt narrow or restrictive interpretation of a statute in order to avoid a clash with the requirements of the Convention rights. In *R* v. *Lambert* a majority of the House of Lords was able to 'read down' provisions of the Misuse of Drugs Act 1971 in order to interpret a reverse onus clause as imposing an evidential (rather than a legal) burden on the accused.[54]

Both techniques are available to the courts seeking to invoke section 3(1) HRA, but only to the extent that their use would not amount to an overt act of judicial legislation; section 3(1) 'does not entitle judges to act as legislators'.[55] In order to remain within the permissible realms of 'interpretation' adopted meanings must 'go with the grain'[56] of the legislation under scrutiny (in other words, must not undermine a 'fundamental feature'[57] of the statute under consideration). As Lord Rodger outlined in *Ghaidan* v. *Godin-Mendoza*:

> '… using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by impli-

[49] See e.g. *McCartan Turkington Breen* v. *Times Newspapers* [2001] 2 *AC* 277, 297 (Lord Steyn); *Brown* v. *Stott* [2001] 2 *WLR* 817, 835 (Lord Bingham), 839 (Lord Woolf).
[50] Thoburn v. Sunderland City Council [2003] QB 151.
[51] R v. Director of Public Prosecutions, ex parte Kebeline [2000] 2 AC 326, 375 (Lord Hope).
[52] For a historical survey see R. Stevens, *The English Judges: Their Role in the Changing Constitution* (Oxford, Hart Publishing 2005).
[53] *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557.
[54] *R* v. *Lambert* [2001] *UKHL* 37; [2002] 2 *AC* 545.
[55] *R* v. *S (Complainant's Sexual History)* [2001] *UKHL* 25; [2002] 1 *AC* 45, 87 (Lord Hope).
[56] *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [121] (Lord Rodger).
[57] *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [33] (Lord Nicholls).

> cation or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.'[58]

Nor does section 3(1) entitle courts to take decisions 'for which they are not equipped' such as decisions requiring a legislative response due to their far-reaching ramifications, decisions with a significant social policy element, or decisions which the judicial process is ill-equipped to resolve.[59]

These limitations notwithstanding, the potential for section 3(1) to be used to significant effect has been acknowledged in that it empowers courts to 'modify the meaning, and therefore the effect, of primary and secondary legislation'[60] in order to achieve Convention compliance.

11. Do national courts try to avoid conflicts with the ECHR by means of constitutional review or construing national law in conformity with the constitution (*Verfassungskonforme Auslegung*)?

The implementation of the HRA itself was designed to reduce the occasions on which the United Kingdom was found to be in breach of the obligations imposed by the ECHR; the Labour government which proposed the HRA, and piloted the Human Rights Bill through Parliament, was explicitly motivated by 'the number of cases in which the European Commission and Court have found that there have been violations of the Convention rights in the United Kingdom.'[61] The *obligations* which the HRA, in turn, imposes on domestic courts – relating to the interpretation of legislation, policing the legality of public body decision-making and the exercise of their own powers – underpins the suggestion that the application of the Convention rights might be described as acting as the United Kingdom's equivalent to an explicit system of constitutional review.[62]

Research published in 2007 indicated that the HRA can be seen to have had a positive effect in addressing concerns over the frequency with which the United Kingdom was found to have breached the ECHR and highlighted a 'definite reduction in the number of applications declared admissible and the number of judgments where at least one violation of the ECHR has been found.'[63]

12. Do national courts use EU law as a vehicle to review the compatibility of national law with the ECHR?

Though the potential to utilise principles of EU law as a vehicle to bolster the protections offered by the Convention rights may be tactically appealing (for the reason that domestic courts are able to disapply primary legislation which is inconsistent with directly-effective EU law), the Convention rights – as applied under the HRA – are utilised far more frequently than EU law in order to vindicate individual rights. Some evidence exists to suggest that the standards of legality imposed by the Convention rights are regarded as being more exacting; in the 2007 decision *R (Countryside Alliance)* v. *Attorney-General*, Lord Brown observed that he 'would have thought interferences with the fundamental rights and freedoms guaranteed by the Convention more … difficult to justify than restrictions on the merely economic rights of free movement of goods and services provided for by the Treaty.'[64]

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[58] *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [121] (Lord Rodger).
[59] *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [33] (Lord Nicholls).
[60] *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [33] (Lord Nicholls).
[61] Rights Brought Home: The Human Rights Bill (Cm.3782), October 1997 at [1.16].
[62] Kavanagh 2009, *supra* n. 15.
[63] M. Amos, 'The impact of the Human Rights Act on the United Kingdom's performance before the European Court of Human Rights', *Public Law* (2007) p. 655 at p. 675.
[64] [2007] *UKHL* 52; [2008] 1 *AC* 719 at [163].

To date the influence of the EU Charter on Fundamental Rights has not been fully felt in the United Kingdom.

13. Is there a preferential order in the use of techniques (i.e. treaty-conform interpretation, setting aside national law, ordering the legislature to amend legislation, constitutional review, *Verfassungskonforme Auslegung*) to avoid violations of the ECHR?

Treating the HRA as the United Kingdom's concerted attempt to avoid incompatibilities between domestic law and the ECHR, violations between statute law and the Convention rights can be judicially-remedied (utilising section 3(1) HRA) or might be remedied by the elected branches following the judicial issue of a declaration of incompatibility. In the latter case, the incompatibility might be addressed by way of primary remedial legislation, or as a result of the remedial order procedure contained in section 10 HRA.

There is some dispute as to which of the two processes is preferential. Many hail the 'declaration of incompatibility' innovation as the unique design feature of the HRA which allows the Act to sidestep the 'counter-majoritarian' criticisms which have been levelled at other (constitutional) rights instruments. In theory at least, section 4 HRA permits the ultimate resolution of rights questions to be handed back from courts to the elected branches of government. However, while section 4 may enjoy democratic credibility its remedial effectiveness is open to doubt for the reason that it does not compel a response from the executive and/or legislature.

The intentions of the enacting government appeared to endorse the preferential use of section 3(1); as the then Lord Chancellor, Lord Irvine of Lairg QC, outlined in 1998 'in 99% of the cases that will arise [under the HRA], there will be no need for judicial declarations of incompatibility.'[65] Early in the life of the HRA it was clear that at least some support for this view existed amongst the senior judiciary; in *Ghaidan* v. *Godin-Mendoza*, Lord Steyn described section 3(1) as the 'prime remedial measure' in the HRA, and a declaration of incompatibility as a 'measure of last resort.'[66]

In practice, declarations of incompatibility have been issued in a far greater number of cases than government predictions seemed to indicate.

PART 3 – Dealing with the judgments and decisions of the ECtHR

14. Do the national courts, when interpreting and applying ECHR provisions, refer to judgments/decisions of the ECtHR?
14.a. If so, do they do this standardly / frequently / sometimes / rarely?
14.b. Does it make a difference if your state was not a respondent party to the case at hand? I.e., do the courts generally refer to the case law of the Court as a whole (*res interpretata* effect), or is special importance given to the judgments/decisions to which the state has been a party?

Section 2(1) HRA provides: 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Arti-

[65] HL Debs, Vol.423, Col.840 (5 February 1998).
[66] *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [46] (Lord Steyn).

cle 26 or 27(2) of the Convention, or (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.'

In cases concerning the Convention – whether governed by statute or arising at common law – the courts are therefore obliged to 'take into account' relevant Strasbourg authority. A degree of initial scepticism on the part of some judges aside,[67] since the full implementation of the HRA in October 2000 the jurisprudence of the European Court of Human Rights has been routinely engaged with in decisions of the higher courts. In an early assessment of the HRA, Kier Starmer wrote that:

'Between October 2000 and April 2002, the ECHR was substantively considered in 431 cases in the High Court or above. In 318 of those cases, it affected the outcome, reasoning or procedure.'[68]

This stands in sharp contrast to the pre-HRA position:

'Research published in 1997 revealed that in the 21 years from July 1975 to July 1996, the ECHR was substantively considered in 316 cases in the High Court or above and affected the outcome, reasoning or procedure in just 16.'[69]

A Government review of the operation of the HRA conducted in 2006 found that UK courts tend to pay 'close analytical attention' to decisions of the ECHR.[70] Though prior to the implementation of the HRA it was easy to find judicial suggestions that the Convention case law had little to add to the protections afforded domestically by the common law,[71] occasions on which the ECHR jurisprudence is now dismissed by judges as unhelpful, or otherwise not seriously engaged with, are infrequent.[72]

There is no distinction between those European Court of Human Rights Cases involving the United Kingdom and those to which the United Kingdom is not a party in the provisions of the HRA; the relevant provision – section 2(1) – simply states that Strasbourg case-law should be 'taken into account' to the extent that it is relevant.

15. How do courts respond to judgments of the ECtHR in cases to which the state has been a party?
15.a. What general methods exist for the national courts to respond to such judgments (e.g. reconsidering a case after reopening; changing interpretation of national law in similar cases)?
15.b. Do national courts generally comply with the ECtHR's judgments against your own state?
15.c. Do national courts try to adapt or limit the effect of the Court's judgments against your own state, e.g. by adapting the Court's interpretation to fit in as far as possible with the national legal system and the national legal traditions?

Domestic courts generally comply with the requirements of the Convention; they are obligated to do so as a result of section 6 HRA (and are required to take into account relevant Strasbourg jurisprudence whenever decided). While it is the executive that is primarily responsible for the execution of decisions of the ECtHR in which the United Kingdom has been found to be in breach of the Conven-

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[67] In a notorious example one senior judge was found to have given rise to a reasonable apprehension of bias after suggesting the HRA would amount to a 'field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers' in *Scotland on Sunday* (6th February 2000). The judge in question was removed from the bench on which he had recently sat – in a case concerning Article 8 ECHR (*Hoekstra, Van Rijs et al* v. *HM Advocate (No.2)* 2000 SLT 602) – with the case subsequently being reheard by a differently constituted panel of judges (*Hoekstra, Van Rijs et al* v. *HM Advocate (No.3)* 2000 *SLT* 605).
[68] K. Starmer, 'Two years of the Human Rights Act', *European Human Rights Law Review* (2003) p. 14 at p. 15.
[69] *Ibid*.
[70] Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006) p. 11.
[71] For example: *Attorney-General* v. *Guardian Newspapers (No.2)* [1990] 1 *AC* 109, 283-284 (Lord Goff); *Derbyshire CC* v. *Times Newspapers Ltd* [1993] *AC* 534, 550-551 (Lord Keith).
[72] For example: A and Others v. Secretary of State for the Home Department [2004] UKHL 56 at [92] (Lord Hoffmann).

tion the judicial branch may play a complementary – though subsidiary – role. An appeal against conviction, for instance, may occur in the light of a finding of the European Court of Human Rights that Article 6 has been breached[73] (though a finding of a breach of Article 6 prior to conviction will, however, not necessarily result in the relevant conviction being set aside[74]).

Increasingly, the HRA has prompted domestic courts to respond to decisions against the United Kingdom by modifying their previous approach to the relevant domestic law.[75] Though it is open to the courts to modify their approach to national law in the light of a finding against the United Kingdom, the influence of the Convention rights has however not displaced the common law doctrine of precedent; even if an otherwise applicable domestic precedent appears to have been rendered inconsistent with the Convention rights by a more recent line of authority from the Strasbourg court, the domestic courts will remain bound to apply the domestic precedent unless and until the law is changed by a superior domestic court.[76]

Giving effect to the requirements of the Convention in national law, invariably involves a degree of translation or adaptation (largely for the reason as – as outlined above – the Convention rights have not been fully incorporated into domestic law). At common law – especially in the development of the breach of confidence doctrine – the Convention rights have been used to guide development of the law rather than to replace or override existing doctrines; the breach of confidence doctrine has been modified in order to accommodate Articles 8 and 10. Similarly, in the interpretation of statute, the ability of the court to modify the meaning of legislation in order to achieve Convention compatibility is conditioned by the requirements of the HRA itself (i.e. the suggested interpretation must be 'possible') as well as by domestic constitutional conditions (section 3(1) does not entitle courts to take decisions 'for which they are not equipped').

It follows from this that the ability of domestic courts to effectively execute decisions of the ECtHR against the United Kingdom is constrained by two key factors. First, the courts' ability to respond to ECtHR decisions against the United Kingdom is constrained by internal constitutional limitations – especially if the required change to the law cannot be achieved by way of interpretation or through incremental development of the common law.[77] Furthermore, in the event of the failure of the elected branches of government to address the inconsistency between national law and the Convention highlighted by a declaration of incompatibility, domestic courts cannot compel legislative change (even in the face of a European Court of Human Rights decision finding the United Kingdom to be in breach of the Convention).[78] Nor are damages available as a result of the failure of the legislature to amend or replace legislation declared incompatible with the Convention rights under section 4 HRA.[79]

Second, the ability of domestic courts to implement judgments against the United Kingdom has, in the opinion of the Parliamentary Joint Committee on Human Rights, been further curtailed by the – more procedural – preservation of the domestic doctrine of precedent. The finding of the House of Lords that domestic precedents remain binding – even in the face of more recent contradictory authority from the European Court of Human Rights – 'effectively excludes the judicial branch from

[73] Rowe v. United Kingdom (2000) 30 EHRR 1.
[74] *R* v. *Lyons* [2002] *UKHL* 44; [2003] 1 *AC* 976.
[75] See: Manchester CC v. Pinnock [2010] UKSC 45.
[76] *Kay v Lambeth LBC* [2006] *UKHL* 10; [2006] 2 *AC* 465.
[77] R (on the application of Chester) v. Secretary of State for Justice [2009] EWHC 2923.
[78] R (on the application of Chester) v. Secretary of State for Justice [2010] EWCA Civ 1439; [2011] 1 WLR 143.
[79] Section 6(6) HRA.

having a significant role in the implementation of Strasbourg judgments against the UK'[80] (by prohibiting lower courts from departing from the existing domestic precedent and by effectively requiring an applicant to appeal to the apex court).

16. How do courts respond to judgments/decisions of the ECtHR in cases to which the state has not been a party?
16.a. Do the national courts apply a strict 'mirror principle' approach, i.e. do they apply the Court's interpretations as carefully and strictly as possible without offering more or less protection to fundamental rights?
16.b. Do the national courts (sometimes) provide more protection to fundamental rights, e.g. by consciously applying national constitutional provisions or interpreting the ECHR provisions in a more protective manner?
16.c. Do national courts try to adapt or limit the effect of the Court's judgments/decisions, e.g. by adapting the Court's interpretation to fit in as much as possible with the national legal system and the national legal traditions?

An approach which seeks to 'mirror' the requirements of the Convention in their application pursuant to the HRA has developed to be the dominant trend and is best illustrated in the House of Lords decision in *Ullah*. In that case, Lord Bingham, then Senior Law Lord, said the following:

> '… a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention Right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'[81]

This influential passage has cemented a strong judicial presumption in favour of applying (mirroring) the requirements of relevant and applicable Strasbourg case-law in HRA adjudication. A particularly strong presumption appears to operate in respect of relevant decisions of the Grand Chamber of the European Court of Human Rights which have been straightforwardly applied, even in the face of apparent judicial disquiet.[82]

This presumption in favour of the application of relevant Strasbourg authority might be displaced in a number of (specific) circumstances, a number of which will, in practice, only arise in the course of judicial consideration of European Court of Human Rights decisions to which the United Kingdom was a party. For instance, one senior judge in the House of Lords suggested that:

> 'The House [of Lords] is not bound by decisions of the European Court and, if I thought that … they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed.'[83]

More specifically, the same judge – Lord Hoffmann – suggested, in *R* v. *Lyons (No.3)* that a domestic court might not apply Convention case law if 'for example, an English court considers that the ECtHR

[80] Joint Committee on Human Rights, Monitoring the Government's response to Court Judgments finding breaches of human rights (2006-2007), HL128/HC728 at [13].
[81] R (on the application of Ullah) v. Special Adjudicator; Do v. Immigration Appeal Tribunal [2004] UKHL 26; [2004] 2 AC 323, para.20 (Lord Bingham).
[82] See Secretary of State for the Home Department v. AF (No.3) [2010] 2 AC 269.
[83] R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 at [76].

has misunderstood or been misinformed about some aspect of English law.'[84] In practice, this exception to the 'mirror principle' has been utilised by domestic courts in order to request the European Court of Human Rights to revisit a particular decision – or decisions – in order to clarify the precise requirements of the Convention in relation to specific aspects of English law. Two notable exchanges between the House of Lords/United Kingdom Supreme Court and the European Court of Human Rights have taken place in the context of adjudication relating to the compatibility of hearsay evidence with the requirements of Article 6(1) ECHR[85] and in a series of cases concerning the impact of Article 8 on possession proceedings.[86]

17. How do courts deal with the ECtHR's margin of appreciation doctrine?
17.a. Do they apply the margin of appreciation doctrine in the same way as is done by the ECtHR?
17.b. If so, do the courts make careful use of the doctrine, or do they sometimes opt for an overly narrow or overly wide margin of appreciation?

Formally, the margin of appreciation is not applicable by domestic courts. As was outlined by the House of Lords in *ex parte Kebeline*:

> 'By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries.'[87]

In practice however, disentangling those elements of European Court of Human Rights decisions conditioned by the margin of appreciation from those that might be utilised or otherwise relied upon in domestic courts has proven difficult.[88] A number of commentators have criticised the attempts of domestic courts to disentangle the margin of appreciation from those aspects of the Strasbourg case-law which are applicable at the domestic level: '[i]n numerous appellate decisions under the HRA, the courts have paid lip service to the notion that the margin of appreciation has no role to play in domestic decision-making. In nearly every case … the courts have then gone on to apply Strasbourg case-law heavily determined by that doctrine, thus precisely applying the margin of appreciation.'[89]

While the margin of appreciation is not explcitly applied under the HRA, a domestic variant – referred to as deference – is underpinned by similar concerns relating to the authority of primary decision-makers.

18.a. How intensely do courts review legislation and/or administrative decisions on conformity with the ECHR? Do they always opt for marginal / deferential review (test for manifest violation) or can the scrutiny be more strict?
18.b. If strict scrutiny is possible, which standards or factors determine the intensity of the courts' review?
18.c. If the courts can only find a violation of the Convention if it is manifest, it is conceivable that less manifest violations are accepted (so it is conceivable that the ECtHR would still find a violation if it had to decide on the case). If that were to occur, do you think the courts would accept this or would the courts then have recourse to other means to avoid a conflict with the Convention?

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84 *R* v. *Lyons (No. 3)* [2003] 1 *AC* 976 at [46].
85 See *R* v. *Horncastle* [2009] *UKSC* 14; [2010] 2 AC 373 and *Al-Khawaja* v. *United Kingdom*, ECtHR (GC) 15 December 2011, appl. nos. 26766/05 and 22228/06.
86 The relevant domestic authorities are: *Harrow LBC v. Qazi* [2003] *UKHL* 43; [2004] 1 *AC* 983; *Kay v. Lambeth LBC* [2006] *UKHL* 10; [2006] 2 *AC* 465; *Doherty* v. *Birmingham CC* [2008] *UKHL* 57; [2009] 1 *AC* 367; *Manchester CC* v. *Pinnock* [2010] *UKSC* 45. The relevant European Court of Human Rights decisions are *Connors* v. *United Kingdom*, ECtHR 27 May 2004, appl. no. 66746/01; *McCann* v. *United Kingdom*, ECtHR 13 May 2008, appl. no. 19009/04; *Kay* v. *United Kingdom*, ECtHR 21 September 2010, appl. no.37341/06. For discussion see I. Loveland, 'The shifting sands of Article 8 jurisprudence in English housing law', *European Human Rights Law Review* (2011), p. 151.
87 R v. Director of Public Prosecutions, ex parte Kebeline [2000] 2 AC 326, 380.
88 See for instance R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport [2008] UKHL 15.
89 H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford, Oxford University Press 2006) p. 146.

Domestic courts have recognised that public bodies should be afforded a 'discretionary area of judgment' within which 'the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.'[90] The degree to which the courts will defer to the judgments of the elected branches of government is however one of the most contested elements of adjudication under the HRA.[91]

At the structural level, a degree of deference to the *legislature* is inherent in the HRA scheme; statutes may not be struck down by the courts[92] and the ability of Parliament to legislate in apparent, or open, defiance of the requirements of the Convention is preserved.[93]

As a result, the highest courts have acknowledged that – when being asked to declare primary legislation incompatible with the Convention rights – 'great weight' should attach to the legislative determinations of Parliament (and to those legislative decisions determining how rights and competing societal interests should be balanced).[94] That said, respect for the legislative decisions of Parliament has not prevented the courts engaging in review, and interpretation, of legislation concerning topics which would, prior to the implementation of the HRA, have been seen to lie on the fringes of justiciability.[95]

Stricter scrutiny of executive action (and inaction) appears to be mandated by the terms of section 6(1) HRA: '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.' While Parliament might legislate incompatibly with the protections provided by the Convention, executive decisions are not so protected unless the public body concerned was compelled to so act as a result of primary legislation or as a result of legislation which cannot be interpreted consistently with the Convention rights.[96]

In their review of primary legislation the courts have been willing to defer to the judgment of Parliament (in the senses that the courts have acknowledged that certain questions might fall to be properly resolved by the legislature[97] or that weight should attach to the 'considered view' of the legislature as to the balance to be struck between competing rights and/or interests as expressed in statute[98]). In doing so, the courts acknowledge – in accordance with the structural design of the HRA – the legitimate (legislative) authority of Parliament to determine questions of rights.

Such deference is less evident in so far as decisions of the executive are concerned; the courts have shown themselves unwilling to cede determinative authority over Convention issues to delegated decision makers and have been less ready to acknowledge the existence of a 'dialogue' on the meaning and application of the Convention rights.[99] Having said this, *Wednesbury* reasonableness review

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[90] R v. Director of Public Prosecutions, ex parte Kebeline [2000] 2 AC 326, 381.
[91] For a sample of the voluminous literature see: F. Klug, 'Judicial Deference under the Human Rights Act', *European Human Rights Law Review* (2003) p. 125; M. Hunt, 'Sovereignty's Blight: Why contemporary public law needs a concept of "due deference"' in N. Bamforth and P. Leyland, eds., *Public Law in a Multi-Layered Constitution* (Oxford, Hart Publishing 2003); J. Jowell, 'Judicial Deference: servility, civility or institutional capacity?', *Public Law* (2004) p. 592; T. R. S. Allan, 'Human Rights and Judicial Review: A Critique of "due deference", *Cambridge Law Journal* (2006) p. 671; Kavanagh 2008, *supra* n. 44; A. L. Young, 'In Defence of Due Deference' 72 *Modern Law Review* (2009) p. 554.
[92] Section 4 HRA.
[93] Section 19(1)(b) HRA.
[94] R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport [2008] UKHL 15 at [33].
[95] Social policy (*Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30) and national security (*A* v. *Secretary of State for the Home Department* [2004] *UKHL* 56) among them.
[96] Section 6(2) HRA.
[97] For example: *Bellinger* v. *Bellinger* [2003] *UKHL* 21; [2003] 2 *AC* 467.
[98] For example: R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport [2008] UKHL 15; [2008] 1 AC 1312; R (on the application of ProLife Alliance) v. Secretary of State for Culture, Media and Sport [2003] UKHL 23; [2004] 1 AC 185.
[99] See: R (on the application of Begum) v. Denbigh High School Governors [2006] UKHL 15; [2007] 1 AC 100; Belfast City Council v. Miss Behavin' [2007] UKHL 19; [2007] 1 WLR 1420.

still exerts a residual influence – even though proportionality is recognised as the appropriate test in rights adjudication – and on occasion domestic courts' approaches to policing the proportionality of restrictions placed on the Convention rights has been found to fall below the standard required by the European Court of Human Rights.[100]

In practice, and in the context of *both* legislative and executive decisions, courts have been sensitive to the need to preserve the careful balance apparent on the face of the HRA, and to thereby prevent the multi-institutional system of checks and balances it creates from collapsing into a de facto system of 'strong form judicial review.'[101] While the judgment of Laws LJ in *International Transport Roth GmbH* v. *Secretary of State for the Home Department* has been criticised for advocating a rigid, or doctrinal, approach to deference,[102] it nonetheless highlights a number of relevant considerations for courts approaching the contextual analysis of rights adjudication under the HRA. Laws LJ outlined the following four principles:

i. '… greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure … where the decision-maker is not Parliament, but a Minister or other public or governmental authority exercising power conferred by Parliament, a degree of deference will be due on democratic grounds.'

ii. '… there is much more scope for deference "where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified.'

iii. 'The third principle is that greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts. The first duty of the government is the defence of the realm. It is well-settled that executive decisions dealing directly with matters of defence, while not immune from judicial review (that would be repugnant to the rule of law) cannot sensibly be scrutinised by the courts on grounds relating to their factual merits … The first duty of the courts is the maintenance of the rule of law. That is exemplified in many ways, not least by the extremely restrictive construction always placed on no-certiorari clauses.'

iv. '… greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts. Thus, quite aside from defence, government decisions in the area of macro-economic policy will be relatively remote from judicial control …'

Attempts to generate a freestanding doctrine of due deference have, however, been resisted by the judiciary, with the House of Lords in *Huang* seeming to rule-out the development of a doctrinal approach to the consideration of relative institutional competence, specific expertise and so on:

> 'The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judiciary task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.'[103]

19. Do the courts make use of special interpretative techniques used by the ECtHR, such as evolutive interpretation (interpretation 'in the light of present day conditions') or consensus

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[100] See eg: Gillan and Quinton v. United Kingdom (2010) 50 EHRR 45.
[101] M. Tushnet, 'New forms of judicial review and the persistence of rights- and democracy-based worries' 38 *Wake Forest Law Review* (2003) 813.
[102] T. Hickman, *Public Law after the Human Rights Act* (Oxford, Hart Publishing 2010) ch. 5.
[103] Huang v. Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167 at [16].

interpretation? If so, can you estimate if they do so standardly / frequently / sometimes / rarely?

Domestic courts recognise that specific interpretative principles are applied by the European Court of Human Rights in giving effect to the Convention. It is acknowledged, for instance, that the Convention is a 'living instrument' the meaning of which might change over time,[104] that the Convention rights should be applied to present day conditions,[105] and that the protections afforded by the Convention should be 'practical and effective' rather than being 'theoretical and illusory.'[106] The specific influence of such techniques of interpretation at the domestic level, is however, slightly difficult to chart.

Reasoning based around the lack of an evident European consensus has been utilised, inter alia, in:

- In *R (Pretty)* v. *Director of Public Prosecutions* [2001] *UKHL* 61; [2002] 1 *AC* 800 in order to demonstrate the lack of support for a claimed interpretation of the Convention;
- In *Evans* v. *Amicus Healthcare Ltd* [2003] *EWHC* 2161 (Fam); [2005] *Fam* 1 to underpin the suggestion that the state would be afforded a wide margin of appreciation by the European Court of Human Rights in the context of the case arising;
- In *R (on the application of Animal Defenders International)* v. *Secretary of State for Culture, Media and Sport* [2008] *UKHL* 15; [2008] 1 *AC* 1312 as a ground to afford respect (defer to) the judgment of the legislature on how to balance societal interests with the right to freedom of expression.

20. Is the role and position of the ECtHR debated in your country? If so:
20.a. Where is the criticism mainly visible (media, politics, scholarship, court room)?
20.b. What kind of criticism is usually voiced (complaints about expansion of scope; quality of judgments; independence and impartiality of judges; disrespect for national sovereignty; insufficient knowledge of national law; etc)?
20.c. If there is any criticism, is this a new development? When did the criticism first become apparent? Can you explain what gave rise to the criticism?
20.d. Does the criticism affect the status of the ECHR and the ECtHR's judgments/decisions in judicial decision making? If so, what concrete effects does this have (e.g. more frequent references to the margin of appreciation doctrine, more references to national constitutional law, restrictive interpretation of ECtHR judgments/decisions, disapplying the ECHR in favour of national (constitutional) law)?

Political and popular criticism of the European Court of Human Rights is widespread in the United Kingdom. While criticism from within the judiciary and legal profession is less vehement, it is nonetheless occasionally visible and levelled towards the perceived expansionist tendencies of the European Court – referred to by one former Law Lord as the 'occasional extravagances of the Strasbourg Court'[107] – at its relative remoteness from national concerns and lack of direct accountability.[108]

Political and popular criticism of the European Court, and of the application of the Convention jurisprudence in the national system, has tended to take one of two forms. At the general level, there is a

[104] *In Re McCaughey* [2011] *UKSC* 20; [2012] 1 *AC* 725 at [2], [90] and [136].
[105] Implicit in the UKSC decision in *R (Quila)* v. *Secretary of State for the Home Department* [2011] *UKSC* 45; [2012] 1 *AC* 621.
[106] AXA General Insurance Ltd v. HM Advocate [2011] UKSC 46; [2012] 1 AC 868 at [111].
[107] HL Debs, Vol.721, Col.709 (18 October 2010), per Lord Scott of Foscote.
[108] Lord Hoffmann, 'The universality of human rights', 125 *Law Quarterly Review* (2009) p. 416.

sense that decisions of the European Court of Human Rights are increasingly impinging on national sovereignty in the sense that initiatives that have been 'democratically endorsed' at the national level are subsequently challenged on human rights grounds by the European Court. This particular perspective can be argued to be most visible in the current impasse between the United Kingdom executive/legislature and European Court of Human Rights over prisoner voting rights.

Controversy has also arisen in respect of a number of specific decisions (or lines of decisions) taken by the European Court. The development of domestic protections against interferences with personal privacy carried out by the press (informed by the Convention jurisprudence on Article 8 and Article 10 ECHR) has been the subject of considerable controversy; so too have prohibitions against the deportation of individuals to countries where their rights under the Convention might be placed at risk (based on the decision of the European Court in *Soering* v. *United Kingdom*[109]).

Slightly more abstract concerns over the legal protection of human rights are also evident in the debates over the role and position of the European Court of Human Rights and domestic implementation of its decisions under the HRA. It is commonplace, for instance, to read that human rights are only available to terrorist suspects, paedophiles and sex offenders or that the rights of such individuals are routinely prioritised over those of others and the broader interests of society. Politicians will frequently criticise decisions taken on human rights grounds as spurious and having been taken in defiance of 'common sense'.[110] Human Rights are claimed to have given rise to a 'culture of compensation'[111] and – even more bizarrely – were claimed to be responsible for riots which took place in London and elsewhere in the United Kingdom during 2011.

21. Are there any intentions at the political level to amend the constitution or legislation in order to change the courts' competences in relation to the interpretation and application of the ECHR?

Although enacted (1998) and fully implemented (2000) under a Labour government, the HRA soon became seen as a thorn in the side of subsequent Labour administrations,[112] and has been mooted as a target for repeal by an incoming Conservative administration since at least 2005.

The turning point was most probably the declaration of incompatibility issued in respect of the detention without trial provisions of the Anti-Terrorism, Crime and Security Act 2001 the centrepiece of the Labour Government's response to 9/11. Since then, numerous Labour and Conservative Ministers alike have portrayed the HRA – and the Convention rights to which it gives further effect – as unnecessary obstacles to effective crime control and the success of the so-called 'War on Terror.'
The Conservative/Liberal Democrat Coalition Government – elected in 2010 and hamstrung by the contrary positions of the (broadly) pro-HRA Liberal Democrats and the anti-HRA Conservatives – committed itself to examining the case for a British Bill of Rights which 'incorporates and builds on' the Convention obligations but which also 'protects and extends *British* liberties.'[113] The Coalition Government – dominated by a party mistrustful of the influence of the European Court of Human Rights – also sought to promote 'a better understanding of the *true scope* of these obligations and liberties.'[114]

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[109] (1989) 11 *EHRR* 439.
[110] 'Afghans who fled Taliban by hijacking airliner given permission to remain in Britain', *The Guardian*, 11 May 2006.
[111] Michael Howard MP, 'Time to liberate the country from Human Rights laws', 18th March 2005.
[112] Though, at the 2010 General Election, the Labour Party was committed to the retention of the HRA.
[113] The Coalition, *Our Programme for Government* (2010), p. 11.
[114] *Ibid*. (emphasis added).

Against this backdrop of political uncertainty regarding the future of the HRA and the role of the European Court of Human Rights in shaping, or influencing, national law, a Commission on a United Kingdom Bill of Rights was appointed in March 2011.[115] The Commission published its report in December 2012.[116] Though all members of the Commission agreed that the idea of a UK Bill of Rights deserved 'further exploration'[117] only a majority of the Commission found that a 'strong argument in favour of a UK Bill of Rights' had been demonstrated.[118] A minority of the Commission argued that the failure of the majority to 'identify or declare any shortcomings in the Human Rights Act or in its application by the courts' undermined this finding.[119]

Subsequent press coverage of the report and findings of the Commission has suggested that a number of members of the majority of the Commission who argued in favour of the adoption of a UK Bill of Rights did so (in defiance of the terms of reference of the Commission) in order to dilute the protections offered by the Convention under the HRA.

The Coalition Government's response to the findings of the Commission on a Bill of Rights remains forthcoming.

PART 4 – Access to information and judgments

22. To what extent do national judges have access to and knowledge of the ECHR and the case law of the ECtHR?
22.a. Are judges trained to apply the ECHR, either in law schools or in professional training?
22.b. How is information about the judgments/decisions of the ECtHR made available to the courts?
22.c. Are important judgments/decisions of the ECtHR available in the national language, e.g. because the government provides translations?
22.d. Do you think there is an impact on the use of ECtHR judgments/decisions by national courts of the fact that they are usually only available in English and French?

In the run up to the implementation of the HRA the Judicial Studies Board invested some £4.5 million in a training programme for the judiciary. Some 3,500 judges, and 30,000 magistrates, were involved in this educational programme led by academics, practitioners and representatives from leading human rights NGOs such as JUSTICE and Liberty.

Those decisions of the European Court of Human Rights that are available in English are more readily accessible, and relied upon, by the domestic judiciary. This does not, however, preclude French language decisions being cited and relied upon.[120]

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[115] The Commission's Terms of Reference were as follows: 'The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties. It will examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties. It should provide interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg court ahead of and following the UK's Chairmanship of the Council of Europe. It should consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012.'
[116] Commission on a Bill of Rights, *A UK Bill of Rights? – The Choice Before Us* (December 2012), available at: www.justice.gov.uk/about/cbr, visited March 2013.
[117] *Ibid*. at [67].
[118] *Ibid*. at [78]-[80].
[119] *Ibid*. at [88(ii)].
[120] Jarvis v. The Commissioners for Her Majesty's Revenue and Customs [2012] UKFTT 483 (TC).

23. Are national judgments/decisions in which the ECHR plays a role available electronically? Are they translated into English?

Virtually all domestic judicial decisions concerning the Convention rights are available electronically, either via legal databases such as Westlaw or LexisNexis or directly from the website of the relevant court.[121]

PART 5 – Concluding questions

24. To what extent do you think there is a connection between, on the one hand, the main features and characteristics of your constitutional system and the status of international law in the national legal system and, on the other hand, the impact of the ECHR and the judgments of the ECtHR on national case law?

Even notwithstanding the inability of UK courts to invalidate primary legislation on human rights grounds, the HRA – and the Convention rights to which it gives effect – can certainly be argued to function as a proto-Bill of Rights for the United Kingdom. The apparent ease with which the relevant rights have been assimilated into the legal system speaks to (a) the relative familiarity of the courts with the rights themselves, the techniques employed by the European Court of Human Rights and the body of the Strasbourg case-law and to (b) a desire on the part of at least some judges to be able to employ more robust or enquiring analyses – such as the proportionality test – in the course of judicial review proceedings. (The perceived failings of the so-called 'political constitution' and its inability to respond to increased threats to individual liberties prompted a number of senior judges – prior to the adoption of the HRA – to call for increased protection for individual rights in specified areas[122] or for the incorporation of the European Convention.[123])

It is equally reasonable to suggest that the main characteristics of the UK constitutional system – namely, the central place of parliamentary sovereignty and the necessarily subordinate role afforded to the judiciary – can be seen to underpin continued political resistance to the notion of judicially-enforced rights. The clear divisions between the national and international norms (and the superiority asserted by the former over the latter) are manifested in political resistant to the decisions of a supra-national court exerting influence at the national level. While the traditional faith displayed in the United Kingdom constitution to mechanisms of political accountability (essentially, the accountability of Ministers and Government to *Parliament*) can also be seen in the perennial debates over the legitimacy of (even weak form) judicial review in the United Kingdom.

25. How does the application of the ECHR in the case law of the states relate to the role of national fundamental rights (e.g. constitutional rights)?

Although the courts development of fundamental common law rights had reached a relatively advanced stage prior to the implementation of the HRA, the development of this jurisdiction has been effectively stifled following the implementation of the HRA. It is unsurprising perhaps that since its implementation, the HRA has provided the primary mechanism through which human rights disputes make their way before the courts. The Convention rights are utilised much more frequently as

[121] For instance <www.supremecourt.gov.uk> and <www.judiciary.gov.uk>, visited March 2013.
[122] See e.g. *Kaye* v. *Robertson* [1990] *FSR* 62.
[123] T. Bingham, 'The European Convention on Human Rights: Time to Incorporate', 109 *Law Quarterly Review* (1993) 390.

tools of adjudication, and play a far more important role in the protection of individual freedoms, than constitutional rights existent at common law.

26. To what extent do you think that debates on the role of the ECtHR and its judgments have an impact on national case law?

While some judges have hinted that further expansion of the fundamental common law rights jurisprudence might be a possibility[124] – especially in the event that any future Bill of Rights might dilute the protections currently afforded under the HRA and by the Convention rights[125] – the view from the apex court would suggest that constitutional common law rights currently remain tools of statutory interpretation and little more.[126]

27. Do you think there is any relation between the debate on the ECHR and the national constitutional system for implementating international law and if so, to what extent?

It is possible to speculate that the views of certain judges on the European Court of Human Rights helped to shape their interpretation of the HRA and the domesticated Convention rights. Lord Hoffmann's argument that human rights be universal in spirit, but domestic in their application,[127] finds a parallel in his speech in the House of Lords decision in *Re McKerr*, for instance, where he argued that the Convention rights under the HRA were domestic (not European) rights to be interpreted and applied by domestic courts.[128] It may also be possible to speculate that political disquiet over the role played by the European Court of Human Rights might play an (indirect) role in prompting domestic courts to resist application of Strasbourg decisions felt to be based on misunderstandings of United Kingdom law (as described above).

Debates over the influence of international law in the UK Constitution are heavily focused around the influence of (a) European Union law and (b) the European Convention on Human Rights. The influence of international law more broadly construed attracts very little adverse attention in the United Kingdom by comparison.

[124] International Transport Roth GmbH v. Secretary of State for the Home Department [2003] QB 728, para.71.
[125] Sir Jack Beatson, 'Human Rights and Judicial Technique' in R. Masterman and I. Leigh, eds., *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (183 *Proceedings of the British Academy*) (Oxford, Oxford University Press 2013).
[126] Watkins v. Secretary of State for the Home Department [2006] UKHL 17; [2006] 2 AC 395 at [62].
[127] Lord Hoffmann, *supra* n. 108.
[128] *In Re McKerr* [2004] *UKHL* 12 at [65] (Lord Hoffmann): 'Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention … their meaning and application is a matter for domestic courts, not the court in Strasbourg.'

ANNEX – QUESTIONNAIRE FOR NATIONAL REPORTS

PART 1 – The status of international law in the national constitutional system

1. Can you briefly characterise your national constitutional system? Please pay attention to matters such as:

- Character of the state (monarchy, republic, ...)
- System of government (parliamentary, presidential, …)
- Character of the constitution (written, unwritten)
- System for and extent of separation of powers (both horizontal (trias politica), and vertical (federation vs. unitary state, decentralisation or devolution))
- Main sources of fundamental rights

2.a. To what extent are the national courts (and/or non-judicial bodies, such as Councils of State) empowered to review the compatibility of acts of parliament and other legislation with the constitution?

2.b. If they are competent to do so, what system of constitutional review is used, i.e.:

- a system of concentrated review (with a constitutional court having the final say on the interpretation of the constitution)
- a decentralised system (where all courts have the power to decide on the constitutionality of acts of parliament)
- anything in between?

2.c. If they are competent to do so, is there:

- a system of a priori review, i.e. review of compatibility before an act is adopted by parliament (e.g. advice by the Council of State)
- a system of ex post review

  If so, what kind of procedures are in place
  - abstract and/or concrete control of norms by direct appeal?
  - abstract or concrete control of norms by means of preliminary questions?
  - a combination of a priori and ex post review?

3.a. Can you briefly characterise the status of international law (treaties, decisions/resolutions by international organisations, customary international law) in the constitutional order? Do treaties, decisions/resolutions by international organisations and/or customary law form part of the law of the land?

In answering this question, you should make a distinction between:

- *provisions of international treaties*
- *international customary law*
- *binding norms created by international organisations (e.g. resolutions)*
- *non-binding norms created by international organisations (e.g. general comments)*
- *binding decisions / judgments in individual cases by international organisations (e.g. judgments of the ECtHR)*
- *non-binding decisions / judgments in individual cases by international organisations (e.g. views of the Human Rights Committee that monitors the implementation of the International Covenant on Civil and Political Rights)*

It should be noted that this question pertains to international law generally, so it is not necessary to deal at length with the specific situation of EU law.

3.b. If so, what rank do treaties, decisions/resolutions adopted by international organisations and/or customary international law have in the national hierarchy of norms? Is there some kind of hierarchy?
3.c. If international law is not part of the law of the land, what guarantees are there that the state will comply with its international obligations under treaties, decisions/resolutions by international organizations, or customary international law?
3.d. Do the competent courts apply treaties, decisions/resolutions adopted by international organisations and/or customary international law as such (i.e. as sources of international law) or are they transformed into sources of national law in the process of incorporation? Are there any differences* in practical consequences between the different approaches? Or is this a mere academic question without practical consequences?

> ** You may think of differences in interpretation (application of the Vienna Convention on the Law of Treaties (VCLT) in case of application of the treaty (etc.) as such; application of national interpretation criteria in case of transformation) or differences in status after abolishment of the international treaty (in case of transformation, the continued existence of the national law provisions is secured, whilst this is not the case if the treaty (etc.) is applied as such).*

3.e. Would you characterise your constitutional system as monist, dualist or a hybrid system? This question has nothing to do with priority, but only with status as such.

4. To what extent and how are the national courts empowered to review the compatibility of the constitution, acts of parliament, lower legislation, and other decisions taken by public authorities with treaties, decisions/resolutions adopted by international organisations and/or customary international law?
If they are:
4.a. Are all courts competent to do so (i.e. a decentralised system of judicial review) or is the competence limited to designated judicial bodies (e.g. a constitutional court or the highest courts)?
4.b. Are the courts competent to give priority to international law if national law conflicts with treaties, decisions/resolutions adopted by international organisations and/or international customary law? If so:

- Is this competence based on national (constitutional) law? Or is it inferred from the nature of international law (e.g. the nature of self-executing treaties or the principle of pacta sunt servanda)?
- Which formal competences do the courts have to give such priority (e.g. disapplying national law in the case at issue, declaring national law null and void)?
- Is there a difference between priority over legislation/acts of parliament and priority over the constitution?
- Does declaring an act null and void have ex tunc effect or ex nunc effect, or is it possible for the court to set a time limit for the legislature to make amendments before the act loses its legal effect?

5. Can parliament and/or the government play a role in determining whether an act of parliament which has been already been enacted and entered into force is compatible with the constitution and/or international law?

> *It may be very difficult to imagine how this could take place. A classic example is the référé législatif as it previously existed in France: in case an act of parliament raised questions on interpretation or compatibility of an act with higher law, the court had to refer a question to parliament to which a binding answer was given. More modern versions may perhaps concern involvement of parliament when a constitutional court has to decide on the interpretation of legislation (Germany?). A very 'light' role may be played if parliament can play a role in evaluations of the legislation, but then there is no direct relationship between the courts and the legis-*

lature. In answering this question please also address cases (if any) where the government has a power to intervene in lawsuits where the compatibility of an act of parliament with the constitution and/or international law is in dispute.

PART 2 – Competences and techniques of national courts to apply the ECHR (or avoid violations of the ECHR from occurring)

6.a. Do all the substantive provisions of the ECHR (including the various substantive protocols) have direct effect, i.e. are they self-executing/directly applicable?

This question does not refer to whether the ECHR and its Protocols are part of the law of the land, but to an issue which may arise after the latter question is answered in the affirmative, namely whether the national courts consider the substantive provisions of the ECHR and its Protocols of such a nature that they may avoid a conflict with those provisions by applying them directly. Or are some of the (substantive) provisions of the ECHR and its protocols considered to be of such a nature that they can only be implemented by means of legislative measures?

6.b. To the extent that the substantive provisions of the ECHR and its Protocols are considered to be self-executing / directly applicable / have direct effect, does this ipso facto mean that these provisions result in subjective rights enforceable before the national courts? Or are there any substantive provisions that are considered to be self-executing, but may not result in subjective rights? If so, please give examples.

6.c. If some of the substantive provisions of the ECHR and its Protocols are considered to be of such a nature that they can only be implemented by means of legislative measures, are the national courts nevertheless competent to apply those provisions to establish state responsibility in cases where those provisions have been violated?

If so, which remedies are possible? E.g.:

- Are the national courts competent to order the state or its bodies to compensate the damage caused by violations of non-self-executing provisions of the ECHR and its Protocols?
- Are the national courts competent to order the State to adopt (legislative) measures which are necessary to implement non-self-executing provisions of the ECHR and its protocols?

  An affirmative answer to question 6c may of course blur the distinction between self-executing and non-self-executing treaty provisions. If this is the case, please elaborate on this. The same may apply to the answer on question 6b.

7. The case law of the ECtHR includes (positive) obligations on national courts to apply the Convention in relations between private parties (i.e. in horizontal relationships). Courts must refrain from interpreting contractual obligations in violation of the ECHR (*Khurshid Mustafa & Tarzibachi*, *Pla & Puncernau*). When deciding on horizontal conflicts between rights (e.g. the right to freedom of expression and the right to respect for one's reputation) they have to take account of the ECHR, and sometimes they are required to interpret national law in a specific manner (e.g. family law cases should always be decided in concreto, taking the best interests of the child into account). Do the national courts indeed apply the relevant ECHR provisions (or the corresponding provisions of the incorporating act) to cases between private parties, in compliance with the case law of the ECtHR?

8. Are there examples of cases in which national legislation or national decisions have been set aside / declared null and void / disapplied because of a conflict with the ECHR?*

** The case may be that national constitutional rights, rather than ECHR provisions, are used as a basis to strike down legislation or that a combination is used of constitutional or ECHR provisions. If this is likely to occur, please mention this in the reply: it is very interesting to know if and in what cases such combinations are used and if and in what cases the constitution rather than the ECHR is used as a basis for review.*

In answering this question, please make a distinction between review of national legislation and national administrative decisions.

8.a. Can you estimate if this occurs frequently / sometimes / rarely?

8.b. If constitutional review is possible: can you estimate if the constitution is used more often / just as often / less often than the ECHR as a basis for holding that legislation or decisions do not comply with fundamental rights norms?

8.c. Are there any examples where the court has declined to use its competence to set aside national legislation / decisions in order to respect separation of powers (between the courts and the legislature or between courts and administrative bodies) or the sovereignty of parliament?

9. Are the national courts competent to order* the national legislature to bring national law into conformity with the ECHR by means of amending or introducing legislation?

Cf. question 6.c.2. Question 6.c.2 relates to state responsibility for violating non-self-executing provisions of the ECHR, while question 9 is not limited to non-self-executing provisions.

**A court may be competent to decide that an act of parliament violates the ECHR, but it may lack the competence or be reluctant to set aside the act, declare it null and void or replace the relevant provisions. In the Netherlands, the court may then sometimes conclude in its judgment that it is up to the legislature to adapt the relevant legislation to the findings of the court within its own area of discretion. This is a different situation, however, from that in which the court can actually order the legislature to change the relevant legislation, i.e. impose a legally binding obligation on the legislature to make changes – in the Netherlands, that would be impermissible because of the separation of powers between courts and the legislature. What we would like to know is if such a judicial competence to impose binding obligations to change acts of parliament exists in the various countries under study.*

10. Do national courts strive to interpret national law (including the national constitution) in harmony with the ECHR?

11. Do national courts try to avoid conflicts with the ECHR by means of constitutional review or construing national law in conformity with the constitution (Verfassungskonforme Auslegung)?

12. Do national courts use EU law as a vehicle* to review the compatibility of national law with the ECHR?

** Some courts may be inclined to apply the EU Charter of Fundamental Rights or the general principles of EU law as recognised in the case-law of the CJEU, rather than the ECHR provisions, because of the stronger impact of EU law (resulting from the doctrines of direct effect and priority of EU law).*

13. Is there a preferential order* in the use of techniques (i.e. treaty conform interpretation, setting aside national law, ordering the legislature to amend legislation, constitutional review, Verfassungskonforme Auslegung) to avoid violations of the ECHR?

** There does not necessarily have to be an official preferential order or one that is recognised in constitutional law, although it is interesting to know if such an 'official' preferential order exists. More generally, it may be derived from case-law or legal scholarship if there is a general tendency to favour certain techniques over others; or if certain techniques are only used in specific situations.*

PART 3 – Dealing with the judgments and decisions of the ECtHR

14. Do the national courts, when interpreting and applying ECHR provisions, refer to judgments/decisions of the ECtHR?
14.a. If so, do they do this standardly / frequently / sometimes / rarely?
14.b. Does it make a difference if your state was not a respondent party to the case at issue? I.e., do the courts generally refer to the case law of the Court as a whole (res interpretata effect), or is special importance given to the judgments/decisions to which the state has been a party?

15. How do courts respond to judgments of the ECtHR in cases to which the state has been a party?
15.a. What general methods exist for the national courts to respond to such judgments (e.g. reconsidering a case after reopening; changing interpretation of national law in similar cases)?
15.b. Do national courts generally comply with the ECtHR's judgments against your own state?
15.c. Do national courts try to adapt or limit the effect of the Court's judgments against your own state, e.g. by adapting the Court's interpretation to fit as far as possible with the national legal system and the national legal traditions?

16. How do courts respond to judgments/decisions of the ECtHR in cases to which the state has not been a party?
16.a. Do the national courts apply a strict 'mirror principle' approach, i.e. do they apply the Court's interpretations as carefully and strictly as possible without offering more or less protection to fundamental rights?*

> ** If such an approach is adopted, please provide for further details. Do the courts always use this approach, or only some of them, or only in certain situations? Why is the approach used? Is it related, for example, to a notion of separation of powers (additional protection can only be offered by the legislature, not by the courts), or is it related to a certain reluctance to provide for additional protection at the national level (even if Article 53 ECHR allows for such protection to be offered)?*

16.b. Do the national courts (sometimes) provide more protection to fundamental rights, e.g. by consciously applying national constitutional provisions or interpreting the ECHR provisions in a more protective manner?
16.c. Do national courts try to adapt or limit the effect of the Court's judgments/decisions, e.g. by adapting the Court's interpretation to fit in as far as possible with the national legal system and the national legal traditions?

17. How do courts deal with the ECtHR's margin of appreciation doctrine*?

> ** This question specifically relates to the application of the margin of appreciation doctrine by the national courts. In the Netherlands, courts often make mention of this doctrine. They often state, for example, that because the ECtHR has left a wide margin of appreciation to the states, their own review of the reasonableness or justifiability of an interference with a fundamental right should be restrained as well. Strictly speaking it is incorrect if national courts use and apply this doctrine, because it has been developed by the ECtHR as a device to deal with its subsidiary position in relation to the states. The national institutions should offer primary protection and should not automatically apply the doctrine. References to the doctrine may only be relevant if the ECtHR leaves a very limited margin in certain types of cases (e.g. cases concerning press freedom) and the courts want to explain why their own review of the justification for a certain interference is a strict one. In all other cases, the margin of appreciation as such is irrelevant. Of course, however, there may be a need for judicial restraint, deference or 'marginal' review; this is dealt with in the next question. For this question, it is only relevant to know if the*

doctrine is applied in national case law as such and, if so, if this is done in a correct and careful manner.

17.a. Do they apply the margin of appreciation doctrine in the same way as it is done by the ECtHR?
17.b. If so, do the courts make careful use of the doctrine, or do they sometimes opt for an overly narrow or overly wide margin of appreciation?

18.a. How intensely* do courts review legislation and/or administrative decisions on conformity with the ECHR? Do they always opt for marginal / deferential review (test for manifest violation) or can the scrutiny be more strict?

** There can be a difference between the standard of review (test of reasonableness, test of proportionality) and the way it is interpreted and applied ('manifest unreasonableness' or 'manifest disproportionality'). This question does not relate to the standard of review, but to the strictness with which these standards are applied. Theoretically, it would be preferred if first the intensity or level of review is determined (e.g. strict review, intermediate scrutiny, deferential review) and subsequently the various substantive standards of review are applied from the correct level of review (e.g. the requirements for proportionality or necessity may be very high and strict, but they may also be lenient). In practice, it often occurs that the level of intensity and the standards of review are not carefully separated, and that you can only learn from the application of the standards whether the review is actually strict or lenient. In answering this question, this should be taken into account and, preferably, it should be made clear which approach is generally taken by the courts.*

18.b. If strict scrutiny is possible, which standards or factors determine the intensity of the courts' review?**

*** Here you can think of factors such as the seriousness of the interference, the discretionary nature of a certain exercise of competence, the relevant policy area, the weight of the individual right at stake, the importance of the general interests involved, etcetera. If higher courts tend to apply stricter review than lower courts, this is also particularly interesting to know.*

18.c. If the courts can only find a violation of the Convention if it is manifest, it is conceivable that less manifest violations are accepted (so it is conceivable that the ECtHR would still find a violation if it had to decide on the case)***. If that were to occur, do you think the courts would accept this or would the courts then have recourse to other means to avoid a conflict with the Convention?

**** This question is mainly inspired by the Swedish system, where the courts only seem to be competent to set aside acts of parliament in case of a manifest violation. If there is a violation of the Convention, but not a really manifest one, this may still lead to state responsibility under the Convention, so the question is if courts try to avoid or circumvent such consequences. It would also be interesting to learn if there are similar standards in other states.*

19. Do the courts make use of special interpretative techniques used by the ECtHR, such as evolutive interpretation* (interpretation 'in the light of present day conditions') or consensus interpretation**? If so, can you estimate if they do so standardly / frequently / sometimes / rarely?***

** Usually, national courts may not expressly mention the use of methods such as evolutive interpretation. They may simply adopt a novel interpretation or recognise a new element of a right by referring to classic methods of interpretation, such as teleological interpretation. In the answers to the question, this may be further explained. It is particularly interesting, however, if courts do refer to 'changing conditions', 'developments in society' or 'present day conditions'; to 'evolutive' interpretation; or to judgments of the ECtHR in which evolutive interpretation played a particularly important role.*

*** The method of consensus interpretation is very particular to supranational courts such as the ECtHR, who often only adopt a new interpretation if this finds sufficient support in the various member states of the Council of Europe. For that reason it is unlikely that national courts often*

use consensus interpretation. If they ever do so, however, this would be very interesting to know. What kind of consensus are they then referring to (e.g. 'general agreement in Europe' that a certain interpretation is reasonable) and how do they determine if there is such a consensus? Please note that this question does not relate to techniques of 'judicial borrowing' or the use of foreign judgments or comparative materials as a basis (or a source of inspiration) for judicial decision-making!
****** It may be the case that courts do not expressly use evolutive or consensus interpretation, but that such methods are used or mentioned in earlier stages of the procedure (e.g. in advisory opinions of an Advocate General). If such a difference in the use of the methods exists, you could mention this in your answer.*

20. Is the role and position of the ECtHR debated in your country? If so:
20.a. Where is the criticism mainly visible (media, politics, scholarship, court room)?
20.b. What kind of criticism is usually voiced (complaints about expansion of scope; quality of judgments; independence and impartiality of judges; disrespect for national sovereignty; insufficient knowledge of national law; etc)*?

** In your answer to this question you may refer to the answers to questions 15 and 16, which may already give some indication as to how judgments of the ECtHR are dealt with by national courts. In particular, it is interesting to know if the criticism is fuelled by the judgments of the ECtHR, or if it is directed at the way in which the national courts deal with the Convention. Is the criticism related to a few contentious cases decided by the ECtHR (perhaps not even relevant for your own legal system)? Is it directed at fundamental rights more generally, or international law more generally, or the judiciary more generally?*

20.c. If there is any criticism, is this a new development? When did the criticism first become apparent? Can you explain what gave rise to the criticism?
20.d. Does the criticism affect the status of the ECHR and the ECtHR's judgments/decisions in judicial decision making? If so, what concrete effects does this have (e.g. more frequent references to the margin of appreciation doctrine, more references to national constitutional law, restrictive interpretation of ECtHR judgments/decisions, disapplying the ECHR in favour of national (constitutional) law)?

21. Are there any intentions at the political level to amend the constitution or legislation in order to change the courts' competences in relation to the interpretation and application of the ECHR?*

** Here you may think of ways to reduce the influence of the Convention, e.g. by pulling out of the Convention altogether or by limiting the powers of the courts to review the compatibility of legislation with the Convention. It would be interesting to note, however, if there are also movements in the opposite direction. In Belgium and France, for example, the (different versions of the) Question Prioritaire de Constitutionnalité (QPC) system may have the effect that lower courts want to avoid the complex consequences of answering a constitutional question by applying the Convention. Perhaps the intention of the introduction of the QPC may not have been to strengthen the importance of the Convention, but this may be a practical side-effect.*

PART 4 – Access to information and judgments

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22.c. Are important judgments/decisions of the ECtHR available in the national language, e.g. because the government provides translations?

22.d. Do you think there is an impact on the use of ECtHR judgments/decisions by national courts of the fact that they are usually only available in English and French?

23. Are national judgments/decisions in which the ECHR plays a role available electronically? Are they translated into English?

PART 5 – Concluding questions

24. To what extent do you think that there is a connection between, on the one hand, the main features and characteristics of your constitutional system and the status of international law in the national legal system and, on the other hand, the impact of the ECHR and the judgments of the ECtHR on national case law?

> *For example, in the Netherlands the important role and the enormous impact of the ECHR are at least partly due to Dutch constitutional particularities, such as the prohibition of constitutional review, the lack of substantive criteria for the limitation of constitutional rights, the short catalogue of fundamental rights, and the direct effect and priority of all self-executing provisions of international law). The result of this combination has been that the ECHR functions as a substitute bill of rights and that it is applied in the same way as the constitution is applied in other states, whilst the constitution does not have a great role to play in Dutch case-law. This question thus mainly invites you to try to explain if a certain impact of the ECHR on national case-law can be explained from (an amalgam of) specific constitutional rules.*

25. How does the application of the ECHR in the case law of the states relate to the role of national fundamental rights (e.g. constitutional rights)?

> *E.g. do national courts refer to the ECHR more often than to their own precedents and explanations? Is the ECHR as important, less important, more important than national constitutional rights? Does the application of the ECHR have displacement effect for constitutional rights?*

26. To what extent do you think that debates on the role of the ECtHR and its judgments have an impact on national case law?

27. Do you think there is any relation between the debate on the ECHR and the national constitutional system for implementing international law and if so, to what extent?